Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-220

LOCAL 223, UTILITY WORKERS UNION OF AMERICA
Petitioner

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
THE DETROIT EDISON COMPANY AND
WILLIE STAMPS, ET AL
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement	3
I. Whether or Not the Seniority System is a Bona Fide Seniority System	6
II. Whether or not Unions Were Guilty of Violating Title VII or National Labor Relations Act	10
III. Whether the Court Erred in Directing a Quota System for Promotion of Employees	14
IV. Whether the Court of Appeals Properly Directed Local 223 to Pay Attorney Fees	15
Conclusion	15

INDEX OF AUTHORITIES

Cases:	Page
Jersey Central Power & Light v. International Brotherhood of Electrical Workers, 508 F2d 687 (Third Circuit 1975)	8
Labor Board v. Jones & Laughlin, 301 U.S. 1, pp. 45, 46	12
Macklin v. Spector Freights Systems, 478 F2d at 989	11
Meadows v. Ford Motor Company, 510 F2d 1084	4
Steele v. L & N RR, 323 U.S. 192, 199 (1944)	11
Vaca v. Sipes, 386 U.S. 171	13
Watkins v. United Steel Workers (10 F.E.P. Cases 1297)	9
Waters v. Wisconsin Steel Works, 502 F2d 1309 (Seventh Circuit 1974)	8

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Local 223, Utility Workers Union of America, hereafter referred to as "Local 223", Petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

1. The Opinion of the Court of Appeals appears at (App. A, *infra* p. 1-24). 2. The modified opinion appears at (App. B, *infra* p. 1-3). The Opinion and Judgment of the District Court appears at 365 Fed Supp 87 and appears in (App. C, *infra* p. I 253-I 326).

JURISDICTION

The Judgment of the Court of Appeals was entered initially on March 11, 1975 and modified after Petitions for Re-Hearing by the Plaintiffs on May 16, 1975. The jurisdiction of this Court is invoked under U.S.C.A. 1254 (1).

QUESTIONS PRESENTED

(1) Whether or not the record in this case supports the finding of the District Court and affirmed by the Sixth Circuit Court of Appeals that the seniority system in effect between Local 223 and the Detroit Edison Company is not a bona fide seniority system, when the seniority system has always treated all workers equally without regard to race or color; and whether or not the District Court's Order, as affirmed by the Court of Appeals, which results in reverse discrimination as to the white members of Local 223, can be sustained under the Equal Employment Opportunity Act.

(2) Whether the District Court and the Court of Appeals were correct in holding that the Unions in this case

who admittedly had nothing to do with the hiring, rejecting or transferring of any employees were guilty of a violation of Title VII or of THE NATIONAL LABOR RELATIONS ACT because the Unions did not pressure the employer for a change of its hiring practices.

(3) Whether the Courts were correct in directing a Quota System for the promoting and transferring of employees to certain jobs and by so doing prohibit the transfer and promotion of seniority employees as required by the Collective Bargaining Agreement.

(4) Whether or not Local 223 should respond in attorney fees to the Plaintiffs when the record in this case contains no proof of any discriminatory act by the Union as to the Plaintiffs in this cause.

STATEMENT

This is a case of alleged employment discrimination against the Detroit Edison Company, Local 223, Utility Workers Union of America and Local 17, International Brotherhood of Electrical Workers, the Unions who represent some of the employees of Edison, as certified bargaining representatives.

This case involves an important question as to the right of a court to alter the seniority system in effect between the parties when such system makes no distinction between workers as to race, color or any other reason and such agreement provides that there shall be no discrimination because of race by the employer as to any provision of the collective bargaining agreement. The Trial Courts' finding of fact as affirmed by the Court of Appeals is clearly erroneous and not supported by the record. The

courts held that certain provisions of the collective bargaining agreement operated to perpetuate the effects of past discrimination, when such provisions apply equally to white employees. The seniority system in every provision is not only racially neutral on its face, it is racially neutral in its application.

The Court of Appeals of the Third, Fifth and Seventh Circuits have spoken on the seniority question contrary to this decision and others decided by the Sixth Circuit wherein fictional or super seniority has been ordered. The Supreme Court has granted certiorari in the *Franks* case (No. 74-728.) from the Fifth Circuit. There is also pending a petition for writ of certiorari in the *Meadows* v *Ford Motor Company* case from the Sixth Circuit. 510 Fed 2d 1084 (1975).

Another important question in this case relates to the establishment of a quota system, by the District Court, affirmed by the Appellate Court, wherein seniority employees are barred from bidding on job vacancies because of the quotas which permits and orders the Company to hire from the outside rather than train or promote from within as required by the Collective Bargaining Agreement.

This case involves also an important question as to the duty of a Union under Title VII where concededly the Union does not hire, reject, test nor promote any worker, black or white, and as to a Union's duty of fair representation of black workers when no black worker ever used the grievance procedure to protest alleged discrimination because of race.

The District Court made findings of fact and held that the Unions and the Edison Company were liable to the Plaintiffs in punitive damages and ordered changes in the seniority system as it relates to the black members of Local

223. The District Court provided for forward and backward pay to the individual Plaintiffs in this cause.

The Edison Company and the Unions each filed appeals of the District Court Judgment to the Sixth Circuit Court of Appeals. The Court of Appeals made significant changes in the decision of the District Court and remanded the case to the District Court for the purpose of modification of the judgment as it related to many issues in the case.

The Court of Appeals, however, failed to address itself to the appeal of Local 223 that there was no basis on which to find Local 223 guilty of any kind of discrimination against its black members because the record does not factually support any such finding, and the district court's decision was clearly erroneous.

Nor did the Court of Appeals address itself to the issue that the seniority system entered into between Local 223 and the Detroit Edison Company was a bona fide system and that the holding by the District Court that the seniority system was a violation of Title VII of the Act was clearly erroneous and not supported by the record. The District Court decision, as affirmed by the Sixth Circuit Court of Appeals, directs super seniority to certain black members of Defendant Local 223 and results in reverse discrimination as to the white members of Local 223.

The Court of Appeals also directed the District Court to apportion the attorney fees among the several defendants and since Local 223 was guilty of no discriminatory act, such direction as to Local 223 is improper and ought to be overturned.

I.

WHETHER OR NOT THE RECORD IN THIS CASE SUPPORTS THE FINDING OF THE DISTRICT COURT AND AFFIRMED BY THE SIXTH CIRCUIT COURT OF APPEALS THAT THE SENIORITY SYSTEM IN EFFECT BETWEEN LOCAL 223 AND THE DETROIT EDISON COMPANY IS NOT A BONA FIDE SENIORITY SYSTEM WHEN THE SENIORITY SYSTEM HAS ALWAYS TREATED ALL WORKERS EQUALLY WITHOUT REGARD TO RACE OR COLOR AND WHETHER OR NOT THE DISTRICT COURTS' ORDER AS AFFIRMED BY THE COURT OF APPEALS WHICH RESULTS IN REVERSE DISCRIMINATION AS TO THE WHITE MEMBERS OF LOCAL 223 CAN BE SUSTAINED UNDER THE EQUAL EMPLOYMENT OPPORTUNITY ACT.

We say at the outset, that the Court of Appeals properly overturned a substantial portion of the Judgment of the District Court in this cause. We do not quarrel with any of the changes in the District Court's Order made by the Court of Appeals. We do, however, object to the finding by the Court of Appeals where it indicated that:

> "The District Court found that the system of departmental seniority which prevailed at Edisons resulted in further discrimination against its black employees. The record supports this finding. In order to transfer to a high opportunity line of progression in a different department, an employee is required to forfeit all accumulated seniority and often must take a pay cut. Given the small number of blacks hired in the past and the practice of assigning newly hired blacks to menial jobs, this seniority system has served to lock black employees into low opportunity areas of work." (App. A, p. 16).

These findings which have been affirmed by the Court of Appeals clearly are erroneous. The record, contrary to the Court's opinion, does not support that conclusion.

In the instant case, the proofs developed that the seniority system had been in effect for over thirty years. The system provided equal treatment for workers without regard to race, color or any other reason.

The record shows that in no department were there as many blacks as whites and that blacks and whites worked in the same job classifications. The employees of every department transferred on the same basis. Not only do black workers forfeit accumulated seniority if they transferred to another department, such is the situation of the white workers also. While it is true that both black and white workers would, if they transferred from a given job in one department to a job in another department which had a lower pay scale at the beginning rate, suffer a pay cut if he made such transfer, this situation applied to both blacks and whites alike. There is economic justification for such a situation because of the training required for a worker who would transfer from one department to another which could and would result in the opportunity to progress to a much higher wage classification in the future.

There is no justification for the conclusion that these sections of the seniority provisions as found in the collective bargaining agreement have any relationship to discrimination because of race.

Since Title VII provides that a bona fide seniority system shall not be interfered with by a Court, the Court erred in its conclusion that the seniority system, although neutral in its face, had the effect of perpetuating past discrimination and erred also that to correct such alleged

discrimination that blacks were entitled to super seniority.

This is not the case, as has been true of many Title VII cases, where the Courts have found that the seniority systems were discriminatory because they provided for black seniority as opposed to white seniority or established different criteria for a black worker to transfer as related to a white worker. None of the Title VII cases in which violations have been found are applicable to the instant situation.

Title VII clearly mandates that a bona fide seniority system should not be disturbed. We fail to understand how a Court can disturb a system that is not only neutral on its face, but is also neutral in its application. Since all workers are treated in an equal manner, how can the system operate to perpetuate past discrimination?

The seniority issue has been decided in several circuits contrary to the Sixth Circuit's expression favoring the change of seniority systems to provide super seniority for all blacks whether or not they have suffered from any discrimination.

In *Jersey Central Power and Light* v *International Brotherhood of Electrical Workers,* 508 F2d 687, Third Circuit 1975, the Court held that Congress did not intend to change seniority systems under the guise that they might perpetuate past discrimination. The Court held that the challenge to a bona fide seniority system required proof of an intent to discriminate or to discriminate in fact.

In *Waters* v *Wisconsin Steel Works,* 502 F 2d 1309, Seventh Circuit 1974, the Court held that the seniority system which was challenged as having the effect of perpetuating the effects of past discrimination was a bona fide

system and that the legislative history of the Act supported its decision.

In *Watkins* v *United Steel Workers,* the most recent of the seniority decisions, the Court of Appeals for the Fifth Circuit reversed the District Court which found a seniority system which applied equally to blacks and whites was a violation of Title VII because it perpetuated the employer's past discriminatory practices. The Court of Appeals held that historical past discrimination was not a valid argument to upset a seniority system when none of the blacks could prove discrimination as to himself. (10 F.E.P. Cases 1297.)

The decision in the instant case results in a situation where two workers hired on the same day with the same background as to experience and education, one black and one white, receive separate treatment if and when they transfer to other departments.

If they both transfer to a department, other than that in which they were hired, to a beginning job classification which requires training on the job to secure the necessary ability to perform the job, the white worker receives a reduction in wages to the rate of the classification, the black worker carries his wage rate to the new job classification. The white worker does not carry his company seniority to the new department, the black worker carries his company seniority. The only reason for the preferential treatment is because one worker is black. There is no requirement that the black worker prove that he was discriminated against. He need only prove he is black.

The Court has by this decision established a whole group of discriminatees. The white employees of Edison who are affected by this reverse discrimination, who themselves are

innocent of any discriminatory act, are nevertheless to be discriminated against so long as they continue their employment at Edison.

The Equal Opportunity Act does not provide for preferential treatment. It provides for equal treatment.

This decision has created a rift between the white and black members of Local 223 which did not exist prior to this decision. The record of the case reflects that Edison hired an increasing number of blacks prior to this litigation. The hiring was conducted without any incident on the part of the Union or its members.

The reverse discrimination feature of the decision cannot be logically explained to the white members of the Union.

Local 223 is committed to a policy of equal opportunity in the work place but vehemently objects to the decision which creates discrimination, rather than rectifies alleged past discrimination.

II.

WHETHER THE DISTRICT COURT AND THE COURT OF APPEALS WERE CORRECT IN HOLDING THAT THE UNIONS IN THIS CASE WHO ADMITTEDLY HAD NOTHING TO DO WITH THE HIRING, REJECTING OR TRANSFERRING OF ANY EMPLOYEES, WERE GUILTY OF A VIOLATION OF TITLE VII OR OF THE NATIONAL LABOR RELATIONS ACT BECAUSE THE UNIONS DID NOT PRESSURE THE EMPLOYER FOR A CHANGE OF ITS HIRING AND TRANSFER PRACTICES.

The Court of Appeals found on page 17 of its Opinion (App. A.)

> "The two local unions argue that they did not do the hiring, rejecting, testing or promoting and

> should not be held responsible for any of Edison's acts of discrimination. It has long been settled that the Union must attempt to protect its minority members from discriminatory acts of any employer." *Steele* v *L & N RR,* 323 US 192, 199, (1944).

The Court of Appeals is clearly wrong in the citation of the *Steele* case as having any application to the fact in this case. The *Steele* case did not involve the issue of hiring, rejecting, testing or promoting.

In the *Steele* case the Union failed to represent its black members and in fact had bargained with the employer to eliminate blacks. There are not such proofs here. Nowhere in this record was there any evidence that Local 223 failed to act upon any grievance initiated by any of its black members for any reason whatever and certainly there is no evidence that it failed to act with regard to any grievance based upon race discrimination.

The Court of Appeals went on to say on Page 17 of its opinion (App A, p. 17) that the obligation to protect minority members from discriminatory acts of any employer requires:

> "the Union to assert the rights of its minority members in collective bargaining sessions, and not passively accept practices which discriminate against them." Quoting *Macklin* v *Spector Freights Systems,* 478 F2d at 989.

The facts in the *Macklin* case were that the Union failed to process a grievance to arbitration but agreed with Spector Freight Systems that Macklin could only acquire seniority if Spector established a D. C. terminal. The bar-

gaining agreement required the dovetailing of seniority or to establish a separate seniority of employees who were employees of a corporation known as Jacobs prior to the purchase of Jacobs' business and operating rights by Spector Freight Systems, Inc. The complaint was that the Union and Spector conspired to defeat the employment rights of Macklin because of race. The District Court dismissed the complaint. The Court of Appeals reversed and remanded to see if Plaintiff could support his allegations. There is no evidence in the instant case that Local 223 refused to process any grievance by a black member or that it engaged in any conspiracy to thwart the rights of its black members.

The Court of Appeals' quote from the *Macklin* is dicta. There the Union failed to act responsibly, when asked to act by *Macklin*. There is no evidence in this record that the Union was asked to respond or to process a grievance of any black and that it failed to process such complaint in a non-discriminatory manner.

The duty of fair representation has its basis in the National Labor Relations Act. The Act, however, does not give a Union the right to determine the composition of the work force.

This Court in an early decision held:

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them", *Labor Board* v *Jones & Laughlin,* 301 U.S. 1, pp. 45, 46.

Clearly then, the Court of Appeals decision imposing a duty on the Unions to police the employer's hiring practices has no legal basis. A Union represents only those individuals whom the employer chooses to hire and there is

no legal basis by which a Union can determine the composition of the work force.

Local 223 agrees that it has an obligation to represent its black members as well as it white members and to provide for equal treatment of them all. We submit that this record proves that Local 223 has carried out its obligation without question.

We are not certain from reading the Court of Appeals' Opinion whether or not Local 223 is being held guilty of a violation of Title VII or of its duty of fair representation as to its black members or just what the trial court meant we were guilty of since discrimination as to hiring sounds in Title VII and the Court inappropriately cited a National Labor Board duty of a Union to fairly represent employees.

The undisputed facts developed during the trial were, that the individual black members who testified, have been, at one time or another and some at the time of the trial, officials of Local 223. Each of such individuals was charged with the responsibility of the writing and processing of grievances. Not one of the Plaintiffs' witnesses ever filed a grievance alleging he was discriminated against because of race, neither did any other black member. Some of the black witnesses had been on the Union Bargaining Committee and the record shows that they never proposed any contract language which related to hiring, transfer or any other kind of discrimination based upon race.

The Supreme Court has held that before an allegation of the breach of a duty of fair representation can lie against a Local Union that the Complainant must show that he sought to exercise the grievance machinery provided for under the Collective Bargaining Agreement or that he was frustrated in such attempt because of unfair discriminatory treatment by his Union. There were no such proofs here. *Vaca* v *Sipes,* 386 U.S. 171.

III.

WHETHER THE COURTS WERE CORRECT IN DIRECTING A QUOTA SYSTEM FOR THE PROMOTING AND TRANSFERRING OF EMPLOYEES TO CERTAIN JOBS AND BY SO DOING PROHIBIT THE TRANSFER AND PROMOTION OF SENIORITY EMPLOYEES AS REQUIRED BY THE COLLECTIVE BARGAINING AGREEMENT.

The Collective Bargaining Agreement provides for the filling of job vacancies by posting such jobs so that present employees can transfer to them. If no employee bids the Company then fills the job by hiring from the outside.

The Company has historically hired employees to the lowest job levels and has transferred such employees by a bidding system to job vacancies as they occur. The Company has by an on the job training system, and in some cases by classroom training, given its work force the opportunity to learn new skills to fill job vacancies.

The District Court in its order, Section 11, (App C p. I 321), provides as follows:

> "Subject to the availability of applicants the Company shall be recruiting and hiring black applicants or by the promoting and transferring of black employees, fill all future vacancies which are filled from outside the Company or inside the Company in the jobs listed below on the basis of three blacks for every two whites until 25% of the employees in each of these jobs and lines of progression are black."

The Company has implemented this provision and there have been numerous instances wherein jobs have been posted and the black employees of the Company have failed to bid. Because of the quota system the Company has refused to permit white seniority employees to successfully bid to available jobs. The Company has been hiring outside the work force to fill such jobs.

The quota system operates to deprive white seniority employees of the opportunity to bid to available open jobs and is creating a situation wherein a white employee with years of service is precluded from job advancement because he is white. Title VII does not command this result. It in fact prohibits such discrimination.

The quota system should be stricken from the decision of this case as being an unconstitutional invasion of the right of each employee to equal treatment. If the presently employed blacks do not wish to transfer to job vacancies as they occur, the white employees should be permitted to transfer if they desire. The Company may then hire from the outside to fill jobs on the lowest levels as they have historically done and preserve the right of advancement to the presently employed work force, both black and white.

IV.

WHETHER THE COURT OF APPEALS PROPERLY DIRECTED LOCAL 223 TO PAY ATTORNEY FEES.

The Court of Appeals in its remand directed the District Court to apportion attorney fees among the three Defendants in this cause. Since Local 223 has conducted itself in an exemplary manner as to the very serious obligation it has to all of its members, an award of attorney fees against it is unjustifiable.

CONCLUSION

For all of the foregoing reasons, we request the grant of the writ.

Respectfully submitted,

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Dated: August 8, 1975.

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IN THE

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OCTOBER TERM, 1975

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LOCAL 223, UTILITY WORKERS OF AMERICA,
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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
DETROIT EDISON COMPANY and
WILLIE STAMPS, et al.
Respondents.

— — —

No. .....

LOCAL 17, INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
DETROIT EDISON COMPANY,
WILLIE STAMPS, et al.
Respondents.

JOINT APPENDIX

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JOINT APPENDIX

INDEX

A. Opinion of Sixth Circuit Court of Appeals
1-24

B. Modified Opinion of Sixth Circuit Court of Appeals
1-3

C. Opinion and Order of District Court.
I 253-I 326.

JOINT APPENDIX OF LOCAL 223, UTILITY WORKERS UNION OF AMERICA and LOCAL 17, INTERNATINAL BROTHERHOOD OF ELECTRICAL WORKERS.

APPENDIX A

Opinon of Sixth Circuit Court of Appeals

Nos. 74-1007, 74-1008, 74-1009, 74-1675

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

v.

THE DETROIT EDISON COMPANY,
Defendant-Appellant,

LOCAL 17, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Defendant-Appellant,

LOCAL 223, UTILITY WORKERS UNION OF AMERICA,
Defendant.

WILLIE STAMPS, ET AL.,
Plaintiffs-Appellees,

v.

THE DETROIT EDISON COMPANY,
Defendant-Appellant,

LOCAL 17, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Defendant-Appellant,

LOCAL 223, UTILITY WORKERS UNION OF AMERICA,
Defendant.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed March 11, 1975.

Before: PECK, MILLER and LIVELY, Circuit Judges.

LIVELY, Circuit Judge. Two actions seeking relief from alleged racial discrimination in the employment practices of The Detroit Edison Company (hereafter Edison) were consolidated for trial in the district court. In one action, the United States was the plaintiff[1] and in the other the plaintiffs were three black employees of Edison. In addition to Edison, Local 17, International Brotherhood of Electrical Workers (hereafter Local 17) and Local 223, Utility Workers Union of America (hereafter Local 223) were named defendants in both actions. The Association for the Betterment of Black Edison Employees (hereafter the Association) was also named a plaintiff in the action brought by the private plaintiffs, but was dismissed for lack of standing by an order of the district court. The private plaintiffs filed suit as a class action, and in their complaint described the class as follows: "The members of the class are all Black citizens whom Defendant Detroit Edison has refused or discharged from employment, discriminated against with respect to compensation, terms conditions and/or terms or [sic] employment; and/or otherwise segregated, classified, or who were otherwise deprived of employment opportunities, because of their race or color." The complaint stated that the private plaintiffs sued "individually and, on behalf of all other persons similarly situated."

Under the heading "Factual Allegations" the complaint listed a number of policies, practices, customs and usages of Edison which were alleged to discriminate against the plaintiffs and members of the class with respect to employment, compensation, terms and conditions of employment. Included in this listing were the use of departmental or group seniority, the use of arbitrarily long and non-job-related apprentice programs, the use of tests which are unrelated to employment and disproportionately exclude blacks from employment opportunities,

[1] The Equal Employment Opportunity Commission was substituted for the United States of America as plaintiff in the government action.

the use of employment interview practices which exclude blacks from employment for non-job-related reasons or result in inferior compensation and assignment of blacks to low-opportunity jobs, and the claim that the defendants "have established a reputation in the Black community for discriminating against individuals in employment because of race or color." The involvement of the two locals in the discriminatory practices was alleged to have consisted of negotiating agreements which provided for departmental or group seniority rather than company-wide seniority to the detriment of black employees and the failure to object to other discriminatory practices of Edison as previously outlined. It was alleged that the locals have "both breached their duty of fair representation and discriminated against Black persons because of race and color." There then followed a recitation of alleged discriminatory acts which had been practiced upon the three named private plaintiffs.

The complaint concluded with a statement of the legal violations involved in the discriminatory acts and practices alleged. It was claimed that all defendants had violated the provisions of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, the Civil Rights Act of 1866, 42 U.S.C. § 1981 and the Labor Management Relations Act, 29 U.S.C. §§ 151 and 185. The relief sought was a permanent injunction against the continued use of "discriminatory hiring and promotional practices which exclude Black workers and the use of departmental or job group seniority systems"; a declaration that the practices and procedures outlined in the complaint were unlawful; an award of back pay to all members of the class injured by unlawful practices; "and any other additional and alternative relief as may appear to the Court to be equitable and meet." In an amended complaint filed nearly a year and a half after the original complaint, the private plaintiffs alleged that there had been retaliation and intimidation against them since the filing of the original complaint and prayed for punitive damages of $10,000,000.

The complaint of the United States sought a preliminary and permanent injunction against alleged discriminatory practices upon the allegation that Edison "engaged in acts and practices that limit, segregate, classify and otherwise discriminate against its black employees and black applicants for employment in ways that deprive or tend to deprive them of employment opportunities and adversely affect their status as employees because of their race . . . ." The specific practices of Edison referred to in the government complaint were assignment of blacks to low-progression jobs, promotion by departmental and job seniority, the use of non-validated standardized tests for promotion, discrimination in hiring and recruitment practices, use of non-validated standardized tests for employment entry and the company's refusal to correct its practices. The complaint also alleged that the provisions of the collective bargaining agreements with the two locals concerning promotion, demotion and transfer are discriminatory and that the acts and practices of Edison and the locals constitute "a pattern and practice" which denies black persons the full enjoyment of their right to equal employment opportunities in violation of Title VII of the Civil Rights Act of 1964. All of the allegations of the complaints were put in issue by denials of the defendants. The motions of the defendants for jury trials in both cases were stricken and the amended complaint of the private plaintiffs seeking punitive damages against Edison was "conditionally" allowed.

Prior to trial, a stipulation was filed which showed that on April 24, 1972, Edison had 10,630 employees of whom 832 were black. In supervisory positions there were 12 blacks and 1,099 whites; in professional and technical jobs there were 73 blacks and 1,785 whites. This stipulation further showed the distribution by departments in the various seniority groupings listed in the bargaining agreements of Local 17 and Local 223. Numerous exhibits were filed by the parties, particularly the government and Edison. More than 50 witnesses

testified in the trial before the court which consumed 28 trial days over a period of approximately two months.

The court included a "summary" of its findings and conclusions in its opinion and order in addition to specific findings of fact and conclusions of law. The summary included the following statements:

> The evidence was overwhelming that invidious racial discrimination in employment practices permeates the corporate entity of The Detroit Edison Company. The Court finds as proven facts that upward mobility of blacks presently employed at Detroit Edison is almost non-existent, and that qualified potential black employees are refused employment or refrain from applying for employment because of the Company's reputation in the Black Detroit Community for racial discrimination. The Company has taken the position that if any inequities exist between blacks and whites at Detroit Edison, such inequities have accidentally evolved and have not resulted from deliberate discrimination. While this Court believes that the law would require it to find that Detroit Edison has violated the law if it has, without intent to discriminate, fostered practices which have resulted in a racially discriminatory impact, the evidence in this case demonstrates that the Company's discrimination has been deliberate and by design. (Footnote omitted.)
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> It is the conclusion of the Court, in light of the evidence adduced, that the Company is refusing to acknowledge the obvious and has therefore adopted an intractable position.
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> • • •
>
> The long and short of the evidence with respect to the Defendant Unions is simply that the Unions have promoted the interests of its white members without regard to the interests of its black members, and have ignored the plight of the black members in gaining the equal employment opportunity that is their due under the Constitution and laws of the United States.

The district court opinion, which appears at 365 F. Supp. 87, contains detailed findings of fact and conclusions of law and an order which provides for back pay and requires specific affirmative actions designed to eliminate the effects of past discriminatory practices and to prevent future racial discrimination. The decree concludes with a provision for the payment by "defendants" to private plaintiffs of reasonable attorneys fees and the direction that Edison pay to the plaintiffs $4,000,000 in punitive damages and Local 223 pay $250,000 in punitive damages. The recipients of these damages are stated to be "plaintiffs, including both those individually named as plaintiffs and those comprising the class represented by the named plaintiffs but excluding the United States . . . ." It further provides that the court will issue a subsequent order directing the manner in which the money is to be disbursed to the plaintiffs. The award of punitive damages was based on a finding of malice on the part of Edison and Local 223.

All defendants have appealed and the private plaintiffs have appealed from the order dismissing the Association as a plaintiff. The order of the district court from which the cross appeal was taken is affirmed. The Association did not allege either injury to its members or that it had suffered an injury apart from any suffered by its members as a result of the acts of the defendants. Absent an allegation of injury, the Association has no standing to sue. *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). The issues raised by the defendants-appellants will be dealt with individually as required.

PUNITIVE DAMAGES

The relief provisions of Title VII contained in Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (g), do not specifically authorize an award of either compensatory or punitive damages for discrimination in employment practices. Back pay in Title VII cases is considered a form of restitution, not an award of damages. Since restitution is

an equitable remedy a jury is not required for the award of back pay. *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969). Damages are a legal, not an equitable remedy, and the Seventh Amendment requires a jury trial in a statutory action "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." *Curtis* v. *Loether*, 415 U.S. 189, 194 (1974). All defendants demanded a jury trial in the present case and it was denied by the court. Furthermore, in dealing with its power to award punitive damages in this case, the court referred to the 1972 amendment to Section 706(g) which provides:

> [T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

We find no authority in the quoted language for the award of punitive damages. We know of no authority which holds that the awarding of punitive damages is equitable relief. The catchall phrase, "other equitable relief as the court deems appropriate," does not stand alone. It is limited, under the construction doctrine of *ejusdem generis*, to relief of the same kind as that specifically enumerated. While affirmative action may not be limited to the reinstatement or hiring of employees with or without back pay, we believe that it is limited to relief of the same general kind, that is, equitable relief in the form of restitution.

We are not unaware of arguments which have been made in favor of allowing punitive damages in Title VII cases. See *Developments in the Law – Empoyment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1261 (1971); *Implying Punitive Damages in Employment Discrimination Cases*, 9 Harv. Civ. Rights-Civ. Lib. L.

Rev. 325 (1974). In two recent district court cases, it has been held that punitive damages may not be allowed in Title VII actions. See *Van Hoomissen* v. *Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal. 1973), and *Howard* v. *Lockheed-Georgia Co.*, 372 F. Supp. 854 (N.D. Ga. 1974). In *Van Hoomissen*, the court considered the somewhat sketchy legislative history with respect to Section 706(g) and concluded that Congress did not intend to permit an award of punitive damages in Title VII cases. We have been cited to nothing in the legislative history which would compel a different determination.

In the *Howard* case, the court found that Congress would have made clear any intention to authorize compensatory and punitive damages in Title VII cases. In reaching this conclusion, the court noted that Title VIII of the Civil Rights Act of 1964 was amended in 1968 so that Section 812 thereof specifically provides that "[t]he court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages . . . ." Having set forth with such particularity the remedies permitted under the portion of the Civil Rights Act relating to discrimination in housing, it is unlikely that Congress would, in amending the relief provisions of Title VII four years later, fail to specify the award of punitive damages as a measure of relief authorized if that was its intention. The difference between the language of Section 706(g) and Section 812 was noted by Mr. Justice Marshall in *Curtis* v. *Locther*, *supra* at 197. We also agree with the reasoning in *Howard* v. *Lockheed-Georgia Co.*, *supra*, that a private plaintiff who sues under both Title VII and Section 1981 does not enlarge his right to relief beyond that authorized by Title VII. Section 1981 contains no provision for relief by way of damages or otherwise. When it is joined with another statutory right of action such as Title VII which specifies broad equitable remedies for those who have been injured by violation thereof, there is no justification for enlarging those

remedies to include legal relief by way of punitive damages on the basis of Section 1981.

In oral argument, counsel for the private plaintiffs relied particularly on two recent cases as supporting the view that punitive damages may be awarded in Title VII cases. We have read and considered *Evans* v. *Sheraton Park Hotel*, 8 F.E.P. Cases 705 (D.C. Cir. 1974), and *Waters* v. *Heublein, Inc.*, 8 F.E.P. Cases 908 (N.D. Cal. 1974), and find them unpersuasive. In neither opinion is there any analysis of Section 706(g) and primary reliance in *Waters* v. *Hueblein* was placed on the district court opinion in the case which we are presently considering. We note that the government did not seek punitive damages in its complaint, nor did it join in the prayer of the amended complaint of the private plaintiffs. In fact, expressing doubt as to the availability of punitive damages in an action such as the present one, government counsel requested that its case be severed from that of the private plaintiffs in the event the district court should empanel a jury to hear the punitive damages issue or determine to award punitive damages without a jury.

THE CLASS ACTION

The suit of the private plaintiffs was filed as a class action. Each of the individual plaintiffs was an employee of Edison at the time the complaint was filed, and had been so employed for varying periods prior thereto. The class which these three plaintiffs claimed to represent included all black citizens whom Edison "had refused or discharged from employment" or had discriminated against with respect to employment opportunities or employment practices. The court did not enter an order as such making the determination required by Rule 23(c)(1), Fed. R. Civ. P.:

> (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

The original complaint was filed on May 17, 1971 and on January 26, 1973, the court entered a "Memorandum Order Granting Motion to Dismiss Party Plaintiff." In this memorandum order, the court considered the previous motions of the defendants to dismis the Association as a party plaintiff in the private action. It concluded the order with the following language:

> It is the Court's conclusion that the plaintiffs remaining in the law suit, Willie Stamps, James Atkinson, Darney Stanfield, and the United States Government, will adequately protect the interests of the class on whose behalf the law suit is brought, to wit: all black Edison Employees.

Shortly thereafter the trial began and the class action issue was not dealt with in any further order of the court before the decision on the merits. In its decision on the merits as set forth in the court's opinion and order of October 2, 1973, the district court referred to the class represented by the individual plaintiffs as "all black citizens whom defendant Detroit Edison Company has refused to hire and has discharged from employment, discriminated against with respect to compensation, terms conditions and/or terms of employment; and/or otherwise segregated, classified, or otherwise deprived them of employment opportunities because of their race or color." Further, the order provided that:

> The affected class for the purposes of the hiring and transfer provisions of this decree shall be deemed to consist of all black individuals who applied for employment with defendant Detroit Edison Company subsequent to July 2, 1965, and were rejected and black employees who would have applied but for defendant's

> discriminatory hiring policy and/or black employees who were hired prior to the date of the decree and who were actively employed at any time after July 2, 1965, and who were at any time regular employees in the job classifications referred to above as low opportunity jobs.

The order then went on to include the means by which Edison was required to notify the members of the affected class "who were refused hire or who would have been refused hire at Detroit Edison Company between July 2, 1965, and the date of the decree . . . ."

This court has held that the provisions of Rule 23(c)(1) are mandatory and that the court is required to enter an order of determination whether requested by the parties or not. *Garrett, et al.* v. *City of Hamtramck*, — F.2d — (6th Cir., Nos. 73-1862 and 73-1863, Sept. 26, 1974). In the same case, we held that where the district court enters an order which has the effect of defining a class and the parties proceed to trial on the basis of such a determination, the court may not, consistent with fairness or with the provisions of Rule 23(c)(1), amend the definition of the class at the time of its decision on the merits. We hold that the class represented by the individual plaintiffs in the private action consists of all black Edison employees.

Even if plaintiffs had sought a certification that the class which they represent includes rejected black applicants for employment by Edison and those black citizens who were deterred from applying because of Edison's reputation in the community, there is serious doubt that such representation would have been proper. Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." It is distinctly possible that persons who were rejected for employment or deterred from applying would have interests different from those black persons who were actually employed by Edison. It appears that in order to satisfy Rule 23(a)(4) at least two sub-classes would have

been necessary to represent groups other than actual black employees of Edison and that individual plaintiffs having interests in common with the members of the two sub-classes would be required. See *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968). We recognize that every Title VII action is in effect a class action and that a liberal construction should be given to the requirements of Rule 23(a)(2) and (3), and that there be questions of law or fact common to the class and that the claims of the representative parties are typical of those of the class. It is recognized that one purpose of Title VII is to root out an underlying policy of discrimination of an employer or a union regardless of how it is manifested. Nevertheless, though a broad definition of commonality of interests and typicality of claims is desirable, there remains a duty upon the court to consider carefully the requirement of fair and adequate protection in view of the serious consequences of *res judicata* in class actions. *Developments, op. cit.*, 84 Harv. L. Rev. 1220-21 (1971). As judge Godbold wrote in a concurring opinion in *Johnson* v. *Georgia Highway Express, Inc., supra*, 417 F.2d at 1125, a private plaintiff in the Title VII action must provide the district court with sufficient information so that it may "equate and balance what the appellant claims are the limits of the class against the tests of adequate representation, protection of the interests of the class, and manageability of the lawsuit." The private plaintiffs in the present case, did not by pleading or proof, sufficiently advise the court for it to define a class represented by these plaintiffs as including anyone but black employees of Edison.

The limitation of the class represented by private plaintiffs to actual employees of Detroit Edison does not necessarily deprive persons outside the class of the benefits of this action. The complaint of the government charged Edison with practices which, *inter alia*, discriminate against "black applicants for employment in ways that deprive or tend to deprive them of employment opportunities and adversely

affect their status as employees because of their race." The complaint further charged that Edison discriminates against black persons in hiring and recruiting practices and in requiring them to pass standardized tests which have not been validated as a condition of employment. This complaint put in issue the hiring practices of Edison and the rights of applicants who were rejected for employment because of race. Furthermore, a large part of the evidence introduced in support of the government's case consisted of exhibits and other proof on the issue of discrimination in hiring or failing to hire black applicants. While neither the private plaintiffs nor the government introduced the testimony of actual applicants who were ultimately rejected for employment, a great deal of statistical evidence was admitted on the hiring issue. The district court properly considered the claim in the government case that black citizens had been rejected for employment and otherwise denied employment opportunities by Edison because of race.

As has been noted, the court also included in the class represented by the private plaintiffs those persons who would have applied for employment with Edison except for its reputation of not hiring blacks. Although the private plaintiffs pled that Edison had established a reputation in the black community for discriminating against applicants because of race or color, there was no allegation that this reputation actually deterred anyone from applying for employment. No witness testified that he would have applied for employment at Edison but was deterred because of its bad reputation. Several employees of Edison testified to a reputation for discrimination against blacks, but these were people who did not rely on the reputation and were accepted for employment. The government did not refer to this class in its complaint and requested no relief for it in its proposed findings of fact and conclusions of law. In oral argument, counsel for the government referred to this as an "amorphous" class and stated that if such a class existed it would only have been between

1965 and 1968. The government admitted that inclusion of such a class would create serious problems because the identification of individual members would be virtually impossible as would be a determination of the availability of openings for such persons.

The private plaintiffs assert that the failure of the district court to make a class action determination which included the two groups which we have excluded was immaterial. It is claimed that all parties tried the case on the basis of all three groups being included in the class and that the defendants are estopped to complain of the inclusion of all three in the remedial provisions of the judgment. If the case of the private plaintiffs had been tried alone there might be merit to this claim. However, the evidence concerning hiring procedures, rejections and even reputation was competent to prove the allegations of the government complaint. Its admission without specific objection on Rule 23 grounds was not sufficient to enlarge the class represented by plaintiffs to include non-employees of Edison.

We have carefully examined the cases relied upon by the private plaintiffs with respect to this issue. See *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 217 (5th Cir. 1974); *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973); *Rodriguez* v. *East Texas Motor Freight*, —— F.2d —— (5th Cir., #73-2801, Nov. 25, 1974). Each of these cases dealt with a Rule 23 problem in a Title VII case, but none appears to have reached the court of appeals in exactly the posture of the present case. In *Pettway*, it is clear that the class included only current employees of the defendant and that hiring practices were never an issue. The "unidentified class members" referred to in quoted language from the court's opinion deals with the identification *for back-pay purposes* of individual members of the only class of persons represented in the case. It does not refer to identifying persons for the purpose of including them within a class. In *Bing*, there was no 23(c)(1) order, but the court of appeals determined that the class

was a simple one consisting of current employees only, and that all parties knew and acquiesced in the makeup of the class during trial. In *Rodriguez*, the court dealt with a very complex case in which the district court found class action inappropriate. The court of appeals held that the district court is required to make an early class certification under 23(c)(1). The court of appeals then made an independent determination of the appropriateness of the class action claims and of whether the requirements of Rule 23(a) and (b) had been met. This is precisely what the present opinion indicates as an alternative ground for limiting the class to present employees of Edison in the event the order of January 26, 1973 had not been treated as a 23(c)(1) certification.

TITLE VII VIOLATIONS

The record in this case supports the finding of the district court that there was a history of racial discrimination in the employment practices of Edison. These practices affected the hiring of blacks, as well as their initial placement and advancement after becoming employees. While many of the overt acts of discrimination shown in the record occurred prior to July 2, 1965 – the effective date of the 1964 Act – nevertheless the effects of earlier discriminatory practices clearly carried forward to the time of trial. The statistical evidence alone – showing a disproportionately low number of black employees – would be sufficient to support a finding of discrimination in hiring. *Mabin* v. *Lear Siegler, Inc.*, 457 F.2d 806 (6th Cir. 1972). However, a great deal of evidence was produced of other practices of Edison which served to limit the number of black employees and to restrict the opportunities for advancement of those who were hired. The practice of relying on referrals by a predominantly white work force rather than seeking new employees in the marketplace for jobs was found to be discriminatory. The use of racial coding of applications and heavy reliance on subjective judg-

ments of interviewers were found to discriminate against black applicants. Though Edison offered justification for its hiring practices, the findings are supported by substantial evidence.

With respect to placement and promotion, the evidence relating to Edison's testing program established the existence of practices and procedures which consigned black employees to low-opportunity jobs. In light of proven differences in the scores of black and white subjects, Edison failed to demonstrate a differential validity for its test batteries. Further, the court was justified in finding that none of the test batteries had been properly validated considering job performance, the fact that no blacks were involved in some testing, the use of relatively high cutoff scores on many of the tests and the fact that many had not been evaluated for an excessive period of time. Claims of validation studies by Edison which were unsupported by written records could properly be discounted. The court relied on exhibits in the government presentation to find that substantial numbers of blacks were held back though they had demonstrated qualifications for the jobs they sought which were superior to those of successful white bidders. The evidence was in conflict, but none of these findings may be held clearly erroneous.

The district court found that the system of departmental seniority which prevailed at Edison resulted in further discrimination against its black employees. The record supports this finding. In order to transfer to a high-opportunity line of progression in a different department an employee is required to forfeit all accumulated seniority and often must take a pay cut. Given the small number of blacks hired in the past, and the practice of assigning newly hired blacks to menial jobs, this seniority system has served to lock black employees into low-opportunity areas of work. When challenged, a seniority system which produces these results for members of a minority race, while protecting the status of those of the majority, must give way. *Head* v. *Timken Roller*

Bearing Co., 486 F.2d 870 (6th Cir. 1973); *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973).

The seniority system, and many of the hiring practices of Edison, appear fair and objective when considered by themselves. However, a court must view all the practices challenged in a Title VII case in the light of their effect in operation, not in the abstract. As the Supreme Court pointed out in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 –

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

We have applied this principle many times in finding violations in practices and criteria, otherwise fair and neutral, which preserve or perpetuate the effect of past acts of overt discrimination. *Sims* v. *Sheet Metal Workers, Local 65*, 489 F.2d 1023, 1026 (6th Cir. 1973); *Bailey* v. *American Tobacco Co.*, 462 F.2d 160, 162 (6th Cir. 1972); *United States* v. *I.B.E.W., Local 38*, 428 F.2d 144, 149-51 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970). No showing of business necessity was made in the present case.

The two union locals argue that they did no hiring, rejecting, testing or promoting and should not be held responsible for any of Edison's acts of discrimination. It has long been settled that a union must attempt to protect its minority members from discriminatory acts of an employer. *Steele* v. *L. & N. R.R.*, 323 U.S. 192, 199 (1944). This obligation requires a union to assert the rights of its minority members in collective bargaining sessions, and not passively accept practices which discriminate against them. *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973). Acquiescence in a departmental seniority system which produces unequal treatment on the basis of race is sufficient to

subject a union to liability under Title VII. *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1381 (5th Cir. 1974). Although charges of overt acts of discrimination were made only against Local 223, both it and Local 17 were properly held accountable for the natural consequences of a seniority system contained in all their agreements with Edison.

THE REMEDY

A. General

Edison argues that it no longer engages in discriminatory practices and that the record of recent years shows a sharp increase in the hiring of blacks. We are urged to follow the Eighth Circuit in *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (1970), where it was held that, in spite of past discrimination, no injunctive relief was necessary or appropriate in view of the great strides which had been made since the institution of an affirmative action program in 1967. Though the record in the present case reflects some corrective actions on the part of Edison in recent years, we are unable to conclude that the district court was clearly erroneous in finding that Edison's efforts had been largely unproductive. Counsel for Edison have also assured the court that the company is now under new management which is committed to equal employment opportunities. In *United States* v. *I.B.E.W., Local 38, supra*, the appearance of new leadership in a union was held not to justify withholding affirmative relief.

While concluding that an injunction was properly entered, the court must carefully examine other remedial provisions of the district court's order in light of the provisions of the Act and court opinions which have dealt with questions similar to those raised in this appeal. Counsel for the government suggested in oral argument that the decree must be "recast" for greater precision and clarity. We will consider separately those provisions which must be altered on remand.

B. Back Pay

All black employees of Edison are eligible to be considered for back-pay awards. There was no claim of unlawful discharges in this case, but there may be former employees who have left the service of Edison and who should participate in the back-pay provisions of the decree as finally formulated. Although not included in the class represented by the individual plaintiffs, rejected black applicants for employment must be considered for back pay on the basis of the prayer for relief in the government complaint. *United States* v. *Georgia Power Co., supra,* 474 F.2d at 919-21. Not every black employee or rejected black applicant of Edison will automatically qualify for a back-pay award. But each such person should be given an opportunity to establish his entitlement. The criterion is that the wages be "properly owing" to those who are ultimately awarded back pay. *Id.* at 922. Hearings to determine eligibility and amounts of back pay may be held by a special master. See *United States* v. *Masonry Contractors Ass'n,* 497 F.2d 871, 876 (6th Cir. 1974).

It will obviously be impossible to reconstruct the employment history of each black employee and of each rejected black applicant as it would have been if that person had not been subjected to discrimination. There are too many imponderables for an exact equalization, but the object of a back-pay award is to effect restitution. Therefore, the goal is to determine for each eligible employee as nearly as possible the difference between the highest earnings for the jobs he would have bid on and qualified for if a non-discriminatory system of seniority, job posting and bidding and transfer had been in effect. The difference between the amount so determined and the actual earnings of each employee should constitute his back-pay award. *Bowe* v. *Colgate, Palmolive Co.,* 489 F.2d 896, 902 (7th Cir. 1973). Though more difficult of determination, the same procedure must be followed with respect to each rejected black applicant who demonstrates that his rejection was based on racial discrimination. The awards

to rejected applicants must be reduced by their actual earnings after the time of rejection, or amounts earnable with reasonable diligence.

The district court directed that back pay run from July 2, 1965, the effective date of Title VII. The limitations period for back-pay awards is not necessarily the effective date of the Act. See *United States* v. *Georgia Power Co., supra,* 474 F.2d 922-25. Since neither the majority nor the dissenting opinion in *Thornton* v. *East Texas Motor Freight,* 497 F.2d 416 (6th Cir. 1974), cited by plaintiffs, indicates that a statute of limitations was there relied upon by any party, that case does not settle the issue. The defense of limitations was pled in the present case and must be considered. Compare *United States* v. *Masonry Contractors Ass'n, supra.* The 1972 amendment to Title VII included a statute of limitations. Pub. L. 92-261, § 4(a). Prior to this amendment, the period of limitations in a Title VII action was determined by applying the most analogous statute of limitations of the state where the action was filed. The present action was filed before the effective date of the amendment.

In *Marlowe* v. *Fisher Body,* 489 F.2d 1057, 1063 (1973), which also arose in Michigan, we determined that the most analogous Michigan statute of limitation was Michigan Compiled Laws (M.C.L.) § 600.5805(7) which applies to "actions to recover damages for injuries to persons or property." The action in *Marlowe* was brought under 42 U.S.C. § 1981. We believe that the same limitations period of three years applies to this action which was brought under Title VII and Section 1981. The deprivation of civil rights is a wrong to the person. Subsection 7 of M.C.L. § 600.5805 most appropriately deals with an action to vindicate the right of employees to be free of discrimination. *Marlowe* v. *Fisher Body, supra; cf. Madison* v. *Wood,* 410 F.2d 564 (6th Cir. 1969).

Although this court has held that the filing of a complaint with the Equal Employment Opportunity Commission does not toll limitations for an action under Section 1981, *Johnson*

v. *Railway Express Agency, Inc.*, 489 F.2d 525, 529 (6th Cir. 1973), we believe that it does toll the statute for an action brought under Title VII. *United States* v. *Georgia Power Co., supra,* 474 F.2d at 925. In this case, the plaintiff Willie Stamps presented a charge to EEOC on January 11, 1971. (The document was stamped "Received" on that date, though it was not marked "Filed" until March 8, 1971 after referral to the Michigan Civil Rights Commission.) The filing by Stamps tolled the statute of limitations for all members of the class he represented. Limitations were tolled for rejected applicants by the filing of the government complaint on June 22, 1972. The period for which each individual discriminatee may recover back pay must be determined with respect to the accrual of his cause of action, which has been held to be "whenever an individual is directly and adversely affected by the discriminatory practices of the defendant." *Id.* at 924. Thus, an individual employee who was unlawfully denied advancement between January 11, 1968 and January 11, 1971 and a rejected applicant who was unlawfully refused employment between June 22, 1969 and June 22, 1972 will be entitled to an award of back pay from the time of such unlawful act. It must again be pointed out that employees and rejected applicants alike must prove their entitlement to back pay. This will consist of showing that a vacancy existed at the time of application by a rejected applicant or the time of request for transfer by an employee and that another person possessing qualifications equal to or less than those of the claimant was selected, on the basis of race, to fill the vacancy. Unless all these facts are shown to have existed with respect to each individual's claim his denial or rejection may not be deemed to have been unlawful.

C. Seniority and Job Transfer

This court is committed to the "rightful place" theory of seniority enunciated by the Fifth Circuit in *United Papermakers & Paperworkers* v. *United States,* 416 F.2d 980 (5th

Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). See both opinions in *Thornton* v. *East Texas Motor Freight, supra.* The manner in which the rightful place theory is applied is set forth in *Papermakers* as follows:

> The Act should be construed to prohibit the *future awarding* of vacant jobs on the basis of a seniority system that "locks in" prior racial classification. White incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation. 416 F.2d at 988 (emphasis in original).

Under the rightful place theory, in the context of this case where the previous system worked so strongly against transfers for blacks, new seniority (though not back pay) should be available regardless of whether an employee actually sought a transfer previously. See *Thornton* v. *East Texas Motor Freight, supra* at 428-29 (dissenting opinion of Phillips, C.J.).

The district court properly directed that plant-wide seniority be accorded all black employees of Edison, based on time actually worked, for the purpose of permitting transfer to high-opportunity jobs without loss of seniority or reduction in pay. Permitting black employees to transfer and advance and generally to receive the benefits of plant-wide seniority rather than being limited to departmental or job seniority does not violate Section 703(h) of the Act, 42 U.S.C. § 2000e-2(h), which permits an employer to maintain different terms of employment pursuant to a bona fide seniority system. Departmental or job seniority rooted in racial discrimination is not bona fide seniority. However, in awarding retroactive seniority to rejected black applicants and those to be hired in the future, the district court went beyond the prayer for relief in the government complaint. Since rejected applicants

were not members of the class represented by the private plaintiffs the relief afforded them is limited to that sought on their behalf by the United States. The government did not ask for such seniority in its complaint, and there is no provision for it in the requested findings which the government submitted to the district court and which contained five items of "Necessary and Appropriate Relief." Upon remand, the seniority provisions of the decree will be altered to grant plant-wide seniority to black employees only for the time of their actual employment by Edison. There is no conflict between this holding and that of the court in *Meadows* v. *Ford Motor Co.*, — F.2d — (6th Cir., Nos. 74-1258 and 74-1259, January 24, 1975). In *Meadows,* the only named plaintiff was a rejected applicant and the class she represented consisted solely of rejected applicants. Retroactive seniority was part of the relief sought.

D. Conclusion

A number of the provisions of the district court order must be rewritten. Specifically, the preamble to the ORDER, which begins at page 62 of the OPINION AND ORDER filed October 2, 1973, must be modified to limit the class represented by plaintiffs as indicated herein. The same modification must be made to paragraph 2 of the order. Paragraph 3 must be redrafted to require notice to rejected and former employees only and to extend priority to rejected applicants only for new vacancies. Paragraph 4 is approved, with its application limited to actual employees. In paragraph 6, the fourth from the last word should be changed to read "from" rather than "for." Paragraphs 7 and 8 must be restated in accord with the rulings, *supra,* on the back-pay issue. Paragraph 12 must be modified to make its provisions subject to the availability of qualified applicants and to provide a time or maximum percentage at which this obligation ceases. Paragraph 19 of the order shall be deleted in its entirety.

The remaining provisions of the decree are approved. Affirmative action may include the imposition of hiring quotas and the requirement of periodic reporting of progress under the decree. *United States* v. *Masonry Contractors Ass'n, supra* at 877. The provisions granting specific relief to the plaintiffs Stamps and Atkinson are within the discretion of the trial court. The prohibition against use of tests which have not been validated according to EEOC guidelines is likewise reasonable. The district court provided in its order for establishment of a committee "to resolve differences and disputes that may arise under this decree." To the extent this committee is intended to serve in an advisory capacity, it is approved. However, the actual resolution of disputes under the decree is a judicial function which may not be delegated to such a committee.

The judgment of the district court is reversed and the case is remanded for further proceedings in accordance with this opinion, including the setting and allocation of attorneys fees. Each party will pay its own costs on this appeal.

APPENDIX B

Modified Opinion of Sixth Circuit Court of Appeals

(U. S. Court of Appeals—Sixth Circuit)

(Filed May 16, 1975)

Equal Employment Opportunity Commission,
Plaintiff-Appellee,
v.
The Detroit Edison Company,
Defendant-Appellant,
Local 17, International Brotherhood of Electrical Workers,
Defendant-Appellant,
Local 223, Utility Workers Union of America,
Defendant.

Nos. 74-1675, 74-1007, 74-1008, 74-1009,

Willie Stamps, et al.,
Plaintiffs-Appellees,
v.
The Detroit Edison Company,
Defendant-Appellant.
Local 17, International Brotherhood of Electrical Workers,
Defendant-Appellant,
Local 223, Utility Workers Union of America,
Defendant.

ORDER

Before: Peck, Miller and Lively, Circuit Judges.

Petitions for rehearing have been filed herein by the private plaintiffs and EEOC and each has suggested that

a rehearing en banc is appropriate. Less than a majority of the judges of this court who are in regular active service having favored ordering consideration *en banc,* the petitions having been referred to the panel which heard and decided these consolidated appeals upon their original submission.

Upon consideration, it is ORDERED that the opinion filed on March 11, 1975 be amended as follows:

Page 21 of the slip opinion is deleted, and the following language is substituted therefor as new page 21—..... .....*v. Railway Express Agency, Inc.,* 489 F.2d 525, 529 (6th Cir., 1973), we believe that it does toll the statute for an action brought under Title VII. *United States v. Georgia Power Co., supra,* 474 F.2d at 925. In this case, the Plaintiff Willie Stamps presented a charge to EEOC on January 11, 1971. (The document was stamped "Received" on that date though it was not marked "Filed" until March 8, 1971 after referral to the Michigan Civil Rights Commission.) The filing by Stamps tolled the statute of limitations for all members of the class he represented. Limitations were tolled for rejected applicants by the filing of the government complaint on June 22, 1972. An individual employee who was unlawfully denied advancement between January 11, 1968 and the date of the district court decree, March 22, 1974; and a rejected applicant who was unlawfully refused employment between June 22, 1969 and March 22, 1974, will be entitled to an award of back pay from the time of such unlawful act. *Meadows v. Ford Motor Co.,* 510 F.2d 1084 (6th Cir., January 24, 1975). It must again be pointed out that employees and rejected applicants alike must prove their entitlement to back pay. As the Supreme Court stated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973), this burden is met in the following manner:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. (Footnote omitted.)

Requirement (ii) above, may be satisfied by an employee's showing that he indicated a desire to transfer to a vacant job, but did not do so because it would have been futile under existing company practices. Requirement (iv) above, is satisfied if the position was filled by someone possessing the qualifications of the applicant or someone less qualified. Upon these showings back pay will be awarded unless Edison is able to prove that the rejection or failure to transfer was not racially motivated.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX C

Opinion and Order of District Court, Eastern District of Michigan, Southern Division

OPINION AND ORDER

(Filed October 2, 1973)

I. *Introduction*

The Complaint in Civil Action No. 36512 was filed by the above captioned plaintiffs[1] on May 17, 1971. The Complaint in Civil Action No. 38479 was filed by the Government on June 22, 1972. This Court on July 21, 1972 ordered the cases consolidated after finding there to be common issues of law and fact. The Court has previously made a finding that the remaining plaintiffs have standing and may prosecute this class action law suit under the statutes and court decisions invoked and specified by plaintiffs. Jurisdiction is conferred on this Court inasmuch as the cases arise under the Civil Rights Act of April 5, 1866, C. 31, 14 Stat. 140, 42 U.S.C.A. § 1981; the Civil Rights Act of 1964, 78 Stat. 259, 42 U.S.C.A. § 2000-5(e); the National Labor Relations Act, 61 Stat. 136, 29 U.S.C.A. § 151 and 185; and 28 U.S.C.A. § 2201 and 2202.

II. *Theories of the Parties*

The Final Pretrial Order entered by this Court and signed by all parties dated January 2, 1973, states the following theories of the litigants:

[1] At the time of filing, there was an additional party plaintiff in Civil Action No. 36512, namely, the Association for the Betterment of Black Edison Employees. The Association was dismissed on Jan. 26, 1973 as a party plaintiff for lack of standing.

A. *Theory of Plaintiff United States:*

The following is a brief statement of the government's theory:

> Until recent years, the defendant Detroit Edison Company discriminated against its black employees by excluding them from its desirable jobs except in token numbers. Prior to the end of 1968 the Company employed a relatively small number of blacks in a few jobs, primarily as janitors and servicemen in the Building and Properties Department, as utility servicemen and more recently as laborers and stockmen in the Stores and Transportation Department. These few jobs in which blacks were employed offered lower pay than most of its skilled trade occupations and little or no advancement opportunities. Some whites were also employed in these low opportunity jobs, but virtually no blacks were employed in high opportunity, skilled jobs. Many black employees who were limited to low opportunity jobs possessed qualifications equal to or greater than many of the whites whom the Company hired without prior skills or experience and trained for specific trades or crafts within the Company. Since 1965, when Title VII of the Civil Rights Act became effective, the Company has hired blacks in some formerly all white jobs, especially in clerical jobs, in increasing numbers; but its high opportunity hourly paid occupations remained virtually all white until after 1968, and blacks remained concentrated in low opportunity jobs.
>
> The collective bargaining agreements between the Company and the defendants, Local 17 and Local 223, grant preference to employees already in high-oppor-

tunity departments and occupational groups in competition for vacancies in those departments and occupational groups and allow employees who transfer to new departments and occupational groups no credit for time spent in their former departments when competing for future promotions or retention against layoff. A transferring employee who begins at the bottom of a new line of progression or occupational group must also work at a reduced pay rate if this new position pays less than his former position.

Although racially neutral on their face, these collective bargaining provisions carry forward into the present and future the effects of the Company's pattern of excluding blacks from high opportunity jobs by allowing whites the benefit of seniority and preferred bidding positions obtained during a time when blacks where not able to acquire the same advantages.

The Courts have uniformly held that where the effects of such a pattern of discriminatory job assignment are carried forward by the operation of such a a seniority system, Title VII of the Civil Rights Act of 1964 requires that the responsible defendants provide the class of affected black employees with the employment opportunities they would have received but for the pattern of racial assignment or exclusion. Therefore, the government requests an injunction providing an affected class of black incumbents (i.e., those who were assigned to lower paying jobs on the basis of their race), with opportunities to compete for positions in high opportunity occupational groups on the basis of their Company seniority, to transfer, if successful, without loss of earnings, and to carry their Company seniority with them to such new occupational

groups for all purposes, including future promotions and protection against layoff. The government also requests a determination that the defendants[2] are liable to pay back pay to those affected class members, who in an ancillary proceeding, may be shown to have suffered financial loss as a result of the pattern of racially discriminatory assignment.

Until the commencement of Title VII enforcement proceeding, and until the present in the case of some practices, the defendant Company has discriminated against black applicants and potential applicants for employment in its recruiting and hiring practices. Despite recent increases in the number of blacks hired, in 1972 the Company employed approximately 860 blacks, making up only 7.5% of the Company's total employment of approximately 11,500. Approximately 55% of the Company's work force is employed in the City of Detroit which has a black population of 44%. Approximately 75% of the Company's work force is employed within Wayne County which has a black population of 27%; and approximately 85% of its work force is located within the three county area.

The Courts have held in Title VII cases that where blacks traditionally have been excluded from employment, affirmative steps are necessary to recruit and employ qualified appplicants. The government therefore requests an injunction requiring the Company to

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[2] The government expects the evidence to demonstrate that the Company is primarily responsible for the discriminatory practices which have resulted in lost earnings to black employees. Section 706(g) of Title VII provides for such a determination of responsibility. However the government is not prepared at this time to waive all back pay claims against the defendant Unions. [Footnote quoted from Government's Theory.]

cease relying on recruiting through friends and relatives of incumbent employees; to exercise more direct control over the hiring decisions of its department supervisors; to remove test standards as a barrier to black hiring; and, subject to the availability of qualified applicants, to recruit and hire blacks throughout the Company and in specific occupational groups in accordance with numerical goals sufficient to overcome past exclusion of blacks within a reasonable time.

B. *Theory of Private Plaintiffs:*

The theory of private plaintiffs Complaint is as follows:

Racial discrimination with regard to both hiring and promotion is proved by the small nmber of black employees employed at Detroit Edison. The percentage of blacks employed in the work force of Detroit Edison — particularly in the classifications of official, manager, and skilled craftsmen — is substantially smaller than the percentge of black in the City of Detroit. Overt and active racial discrimination has been practiced by defendants against individual black employees through 1973.

Certain practices, arguably neutral and non-discriminatory on their face — have the effect of perpetuating past discrimination and embody such discrimination in the present system:

1. Word of mouth referrals by incumbent white employees of Edison and the compilation of lists of employees who have been recommended by such incumbent whites by various Edison Department Heads.

2. An interview system which does not put employees on notice as to the job opportunities in the company and which accordingly has the effect of denying blacks higher paying jobs because their friends and relatives are blacks, and unlikely to have held such jobs or to know of such jobs in any kind of detail.
3. A departmental and job seniority system utilized for competitive status jobs which penalizes the black employee who has seniority granted in a lower paying job or department because a past discriminatory hiring policy has relegated blacks to such jobs and departments. Moreover, some black employees would be required to take wage cuts in order to transfer.
4. Non-job related tests utilized for both hiring and promotion which have the effect of screening out blacks disproportionate to whites and/or preserve the discriminatory status quo.
5. Educational and other non-job related requirements which screen out blacks disproportionate to whites and/or preserve the discriminatory status quo.
6. Subjective criteria and interview system which screens out blacks disproportionately both from employment and better paying jobs and/or preserve the discriminatory status quo.
7. Subjective criteria utilized by supervisors and other responsible corporate officials and/or preserve the discriminatory status quo.
8. The existence of all white and near all white supervisory workforce has the effect of excluding black

employees from consolidation for both hiring and promotion.

Defendant unions liability are specifically predicated upon the following factors:

The negotiation of the above-referred-to-seniority system which embodies within it the effects of past discrimination;

The failure to take any kind of affirmative action through negotiation, arbitration, or any other means to alter defendant Edison's discriminatory hiring and testing policy;

Individual instances of discrimination against black employees who had appropriate seniority credits under the collectively negotiated system but who nevertheless were excluded for other reasons and for whom the union refused to act affirmatively;

Black employees denied promotion because of discrimination:

The difference between the amount of pay in the job or department where discrimination has prevailed and the amount of pay that such employee has in fact received.

Black employees denied hiring because of discrimination:

The difference between the amount of pay in the job or department in which discrimination prevailed and the amount of pay that such individual earned or might have earned with reasonable diligence.

Edison, through its supervisory and other employees has retaliated, intimidated and interrogated Black employees because of the filing of the original com-

plaint with the Equal Employment Opportunity Commission and the subsequent suit filed in the District Court.

C. *Theory of Defendant Edison Company:*

The vaguely-worded allegations, charges, and claims made against Defendant Detroit Edison Company (hereinafter referred to simply as Defendant) are without basis in fact or law. Defendant continues to deny each and every one of them.

Affirmatively, Defendant says that its employment practices have been and are free from racial discrimination. If any of its employment practices have resulted or do result in differential racial impact (and Defendant does not admit that they have or do), such practices have been and are necessary to the business in which Defendant engages. Defendant has and does recruit, hire, transfer, and promote qualified persons according to their availability and their ability without regard to race or color. Any exceptions to this policy have been and are in favor of black persons pursuant to the standards set down by federal and state government.

Furthermore, Defendant has and does vigorously attempt to further the interests of black persons in equal employment opportunity over and above what is required by law or regulation. True to this goal, Defendant has pursued and will continue to pursue the development of an effective affirmative action program at the Detroit Edison Company.

D. *Theory of Defendant Local 223:*

Local 223 continues to adhere to the denials and affirmative defenses set out in the answers heretofore filed.

It denies engaging in any act, pattern or practice violative of Title VII. It denies that the collective bargaining agreements it has negotiated with the Detroit Edison Company violate the law. It denies that it has failed or refused to represent any person or group of persons employed by the Detroit Edison Company or has differentially treated any person or group of persons for which it is the recognized collective bargaining agent employed by the Detroit Edison Company because of the race of that person or group of persons.

E. *Theory of Defendant Local 17:*

Local 17 continues to adhere to the denials and affirmative defenses set out in the answers heretofore filed.

It denies engaging in any act, pattern or practice violative of Title VII. It denies that the collective bargaining agreements it has negotiated with The Detroit Edison Company violate the law. It denies that it has failed or refused to represent any person or group of persons employed by The Detroit Edison Company or has differentially treated any person or group of persons for which it is the recognized collective bargaining agent employed by The Detroit Edison Company because of the race of that person or group of persons.

III. *Summary of the Findings and Conclusions of the Court*

Plaintiffs have alleged, among other things, that The Detroit Edison Company has traditionally excluded blacks in a discriminatory manner from its high opportunity skilled trades and supervisory positions and that it continues to discriminate against blacks in its hiring and promotion polices and practices. The plaintiffs have also alleged that the Defendant Unions, which are parties to collective bargaining agreements with the Company, have aided and abetted the Company in its discrimination.

This Court has listened carefully to the presentation of evidence in the course of a three month trial in this cause. The evidence was overwhelming that invidious racial discrimination in employment practices permeates the corporate entity of The Detroit Edison Company. The Court finds as proven facts that upward mobility of blacks presently employed at Detroit Edison is almost non-existent, and that qualified potential black employees are refused employment or refrain from applying for employment because of the Company's reputation in the Black Detroit Community for racial discrimination. The Company has taken the position that if any inequities exist between blacks and whites at Detroit Edison, such inequities have accidentally evolved and have not resulted from deliberate discrimination. While this Court believes that the law would require it to find that Detroit Edison has violated the law if it has, without intent to discriminate, fostered practices which have resulted in a racially discriminatory impact, the evidence in this case demonstrates that the

Company's dscrimination has been deliberate and by design.[2]

It is the conclusion of the Court that Defendant Detroit Edison must alter its posture in the area of race relations and immediately begin to deal with the problem of racial discrimination seriously and with moral integrity if it is to fulfill its obligation under the law. It is a matter of public knowledge in this community that new leaders have taken over the management of this important Company. It is imperative that, if this Company is to move forward economically and competitively as its management wants it to, equual employment opportunity for all must be one of the yardsticks, as well as increased sales and profit margins, by which the Company measures its achievements and accomplishments.

It is unfortunate in the view of the Court, that the Company has consistently refused to admit, much less seek to remedy, that its employment practices perpetrate racial discrimination. Indeed, the Company at trial simply denied that it has ever engaged in racial discrimination in employment:

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[2] "Proof of actual intent to discriminate is not a prerequisite to a finding of an unlawful employment practice. Intent is inferred from the totality of the conduct. All we need to show is that 'X' intended to engage in the practice that has a discriminatory impact, not that 'X' intended to discriminate. 'X' may not even be aware that the result of his or her practices are in fact discriminatory. The relevant test for determining whether a practice is discriminatory is whether the effect of it serves to exclude a disproportionate number of persons in a protected class. An employment practice which is based in part on unlawful considerations is not saved by the fact that other non-discriminatory considerations may also have been present." William H. Brown, Chairman, Equal Employment Opportunity Commission, "The Changing Concept of Discrimination," Contact, July 1972, p. 33. See generally *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

> "The Court: Is it your position on behalf of Detroit Edison, Mr. Ford, that as you have checked the records, and you have done it very masterfully and meticulously, that Edison has never been guilty of any racial discrimination in its employment policies?
>
> Mr. Ford: Yes sir.
>
> The Court: That is your position?
>
> Mr. Ford: That is my position, and anybody that thinks differently is certainly invited to come forward with the evidence of it and I don't believe they can do it." [Transcript, pages 113-114].

It is the conclusion of the Court, in light of the evidence adduced, that the Company is refusing to acknowledge the obvious and has therefore adopted an intractable position. Its denials of culpability only serve to indicate the myopia in the history of the Company with regard to its recognition and treatment of the ignoble disease of racial discrimination. Implicit in these Findings and Conclusions is the guiding principle that the Company will not be allowed to continue to violate the law with impunity and will, instead, be required to implement corrective measures designed to treat the root causes of the conditions which bring the Company in violation of the law.

With regard to the Defendant Unions, the Court has heard evidence during the course of the trial that the collective bargaining engaged in by these Unions has resulted in agreements perpetrating racial discrimination and preventing affirmative action to eliminate racial discrimination and the vestiges of such discrimination. The Unions encouraged black employees to withdraw or not press grievances protesting discrimination practices. Collective bargaining agreements define seniority in a way that represses the possibility of advancement by black employees.

Defendant Local 223 has misinformed black members with advice that unsuccessful bids involving jobs outside their departments cannot be put through the grievance procedure under the collective bargaining agreement. Defendant Local 223 has insisted upon adherence to seniority where black members were involved to a much stricter degree than for whites. Defendant Local 223 and the Company have deliberately gerrymandered seniority districts so as to deny black members promotional opportunities in the better paying jobs. Defendant Local 223 and Defendant Local 17 have negotiated for and acquiesced in procedures which lock blacks into low opportunity jobs and have never protested the obviously discriminatory practices of the Company. The President of Defendant Local 223 has insisted upon rerun elections solely for elected black officials, has attempted to exclude blacks from leadership positions, and has failed to take steps against threatening and hostile actions and attitudes of white members expressed towards black members. Defendant Local 17, by referring workers to the Company has directly aided and abetted the Company's discriminatory hiring practices. The unions have an especially heavy burden to represent the best interests of all of their members. The evidence clearly demonstrates that they failed to do so in this case.

The long and short of the evidence with respect to the Defendant Unions is simply that the Unions have promoted the interests of its white members without regard to the interests of its black members, and have ignored the plight of the black members in gaining the equal employment opportunity that is their due under the Constitution and laws of the United States. Tragically, the Unions, which one would look to for leadership in improving the lot of this sector of the population, have instead become an obstacle to human progress to the point where the Court has reluctantly concluded that they are justifiably made defendants in this law suit.

The Constitutional provisions and the statutes enacted by Congress on the subject of equal employment opportunity all find their objective in the brief and eloquent phrase of Thomas Jefferson in the Declaration of Independence:

> "We hold these truth to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.***"

In the modern industrial society which is the United States, and certainly in the modern industrial urban society which is Detroit, to be denied an equal chance at decent employment, and an equal chance at advancement within one's employment, is to be denied that equality so nobly articulated by Jefferson. It is in this context unthinkable that a person would be denied equal employment opportunities at The Detroit Edison Company when employmnt to a man means earning a living which will enable him to provide adequately for his family and provide a good education for his children. Being denied a a job is demeaning to a person and strips him of his dignity and assurance. A person has a right to extend his God-given working abilities to their fullest without being encumbered by artificial, irrelevant, insignificant and superficial barriers, and reasons such as the color of his skin.

The Company and the Unions by their individual and collective actions are guilty of denying this fundamental equality to the members of the class who are the plaintiffs in this lawsuit, and the Court will accordingly move on to consider and put into effect suitable remedies.

IV. *Findings of Fact*

A. *Preliminary Findings*

1. Defendant, Detroit Edison Company, is a public utility, incorporated under the laws of the State of Michigan and doing business in a 7,600 square mile area in southeastern Michigan, where it furnishes electric power to homes, businesses and offices in the Metropolitan-Detroit area. The Detroit Edion Company employs approximately 11,000 employees.

2. Defendant Local 223, Utility Workers Union of America, is an unincorporated association doing business in the State of Michigan and is the exclusive bargaining representative for approximately 4,000 employees working in job classifications represented by Local 223 and grouped in approximately 28 bargaining units.

3. Defendant Local 17, International Brotherhood of Electrical Workers, is an unincorporated association doing business in the State of Michigan and is the exclusive bargaining representative for approximately 800 hourly paid employees working in job classifications in the Underground Lines and Overhead Lines, Field Division, of the Transmission and Distribution Department and the Elevator Division of the Building and Properties Department.

4. The Standard Metropolitan statistical Area (SMSA) racial statistics for 1970 indicate that 44% of the City of Detroit is composed of blacks and 18.2% of the SMSA total population is black. As of 1971, 73.28% of Detroit Edison's employment positions were in Wayne County and 84.11% were in the Tri-County area. As of 1966, 304 of Edison's 9,475 employees were black. At that time, 4 of Edison's 1,722 officials and managers were black (1966 EEOC Report).

B. *Edison Employment Practices—Generally*

5. Testimony shows that for many years Edison employed only a few blacks and only in menial jobs such as janitor, porter, shoe shine boy, elevator operator, and utility servicemen. In the 1940's, '50's and '60's prior to and subsequent to July 2, 1965, Detroit Edison had a reputation of hiring few blacks. Defendant Detroit Edison has had a reputation of limiting those blacks who were hired to low-opportunity jobs such as those which are known as of this time to be 1) In the Property Right of Way Department — Building Cleaner, Janitor, Porter, Serviceman, Wall Washer, Lamp Changer, Elevator Operator and Attendant; 2). In what is now the Stores and Transportation Department — all jobs except for Mechanic; 3) In the Production Department — Plant Cleaner; 4) In the Central Heating Plant, Coal and Ash Handler. Such jobs are low-opportunity jobs because of certain posting, bidding and seniority provisions which give an almost absolute preference to employees already in high opportunity jobs, units and departments.

C. *Union Representation—Background Facts*

6. The record reflects that all collective bargaining representatives for Local 223, Utility Workers of America; Local 17, International Brotherhood of Electrical Workers; and Detroit Edison are white with the exception of plaintiff Willie Stamps. All collective bargaining representatives of all three parties have always been white except for plaintiffs Stamps, James Atkinson and William Armstead, all of whom have been division chairmen in Local 223, Utility Workers of America. All officers of Defendant Detroit Edison are white. At the time of the trial in this case, Stamps was the only black out of approximately 28 chairmen from Local 223 and the only black on either side of the bargaining table.

D. *Specific Indicia of Racial Discrimination*

7. The evidence submitted in this case indicates that defendant Detroit Edison Company has in the past assigned those few blacks who were hired almost exclusively to the low-opportunity jobs referred to in Finding No. 5, *supra*. Defendant Detroit Edison employed no black linesmen in Transmission and Distribution Overhead Lines until 1963. It employed no black sub-station operators until 1968. It employed no black meter readers until 1964. The stated reason of Detroit Edison Company for not employing black meter readers was that the white community was not ready. Defendant Detroit Edison employed no black appliance repair servicemen until 1962.

8. Beginning in the mid or late 1950's, Detroit Edison Company had its personnel interviewers use a racial code or identification system to identify the race of applicants on application forms. The system consisted of the interviewers placing a black dot on the application forms of black applicants so that the race of a black applicant could be easily ascertained at any point in hiring process. This Court finds that the racial code or identification system was used by Detroit Edison to racially discriminate against black applicants. The defendant Detroit Edison asserted and maintained through the course of the trial that this black dot system was inaugurated to insure that more blacks became employed at the Company. The record and testimony in the case negates this position, and indicates very clearly that the black dot system was used to perpetuate and maintain blacks in low paying positions in the Company and exclude them from others. This coding system was known to and acquiesced in by the highest levels of

Detroit Edison Company's employment office and management.

9. The disparity in numbers of whites and blacks hired at Detroit Edison has a historical basis which continues to exist to this day. In 1955, 232 whites and 4 blacks were hired. In 1956, 199 whites and 5 blacks were hired. In 1957, 97 whites and 3 blacks were hired. At some point between 1955 and 1957, the racial coding system came into being. In 1958, 18 whites and 1 black were hired. In 1959, 29 whites and 1 black were hired. In 1960 39 whites and no blacks were hired. In 1961, 52 whites and 2 blacks were hired. In 1962, 74 whites and 2 blacks were hired. In 1963, 142 whites and 9 blacks were hired. In 1964, 229 whites and 33 blacks were hired. In 1965, 481 whites and 34 blacks were hired. In light of the fact that so few blacks were hired, subsequent to the implementation of the racial coding system, this Court can only infer that the racial coding system was instituted for some purpose other than that of achieving racial equality in the employment practices of the Edison Company. Indeed, during the six years subsequent to the introduction of the racial coding system the percentage of blacks hired by Defendant Detroit Edison declined.

10. Testimony demonstrates, and this Court finds, that in many cases black employees with work experience and education superior to that of white employees in skilled trades, were denied high opportunity jobs and were assigned to and refused transfer from low-opportunity jobs, referred to above. White employees lacking a high school diploma or related work experience were and continued to be frequently promoted ahead of black employees with high school diplomas and work experience superior to said white employees.

11. The foregoing-described practices may be illustrated by a few representative examples. Horace Henry, a black high school graduate with credit hours at Detroit City College and an inspector for the government during World War II was refused transfer from utility serviceman from 1945 through 1962 or 1963. Local 223 Utility Workers Union of America encouraged Mr. Henry to withdraw grievances protesting transfer refusals. McKinley Ogletree, a black employee, was hired as a utility serviceman in 1945 and was an apprentice electrician from 1950 through 1955. Mr. Ogletree filed numerous requests for transfer to an electrician's job from 1950 to 1969 and was always denied the right to transfer, being advised by Detroit Edison representatives that "You know you're not going to get the job." Catherine Gafford and Mary Harris, black female elevator operators and high school graduates filed numerous applications for transfers in the 1940's, '50's and '60's without being given the opportunity to transfer.

12. Both prior to and subsequent to July 2, 1965, plaintiff James Atkinson was discriminatorily assigned to low-opportunity jobs. In connection with his applications for transfers and promotions, James Atkinson was advised by Detroit Edison representatives that it was futile for him to apply and that a decision had been made concerning who would get the job before bids were invited. In some situations, Atkinson had observed the job performed whereas the successful white applicant had not. In other situations, Atkinson had actually performed the work which he sought whereas the successful white applicant had not.

13. Plaintiff Willie Stamps, a high school graduate with further education at the Dunbar Trade School in Chicago and Worshin College of Mortuary Science was

discriminatorily refused employment on at least five occasions at Detroit Edison Company in 1956 and between 1965 and 1967. In 1965 and 1966, Stamps was deprived of employment on the pretext that he was not properly dressed and that he was over-weight. On approximately fifteen occasions between 1967 and 1972, Stamps was denied transfer because of his race. In no instance has the Company contended that white employees who were selected instead of Stamps possess superior or equal qualifications. Among the pretexts used to discriminate against Stamps was the contention that he was over qualified for the job for which he applied. Stamps was also harassed and discriminated against by Defendants Detroit Edison and Local 223 because of his civil rights activities at Detroit Edison.

14. The record in this case indicates that in order to implement and perpetuate discriminatory policies and practices, Detroit Edison relied heavily on its transfer policies with respect to low-opportunity and high-opportunity jobs. High-opportunity jobs possess pay grades and working conditions demonstrably higher and superior to the pay grade of low-opportunity jobs. High-opportunity jobs for blue collar employees at Detroit Edison are in, for instance, Construction and Maintenance, the Transmission and Distribution Departments and the Production Department. Starting pay grades in Construction is generally pay grade 5 ($4.32 per hour). Skilled trade jobs such as Brickmason, Carpenter, Electrician, Mechanic Fitter, Plumber, Rigger and Welder enable journeymen to receive wages between pay grades 16 ($5.935 per hour) and 18 (6.27 per hour). In Transmission and Distribution, the pay grade for Maintenance Cable Splicer reaches 18 ($6.27 per hour). In Production and Senior Plant Operator it reaches 17 ($6.13 per hour).

15. In low-opportunity jobs — out of which transfer to high-opportunity jobs is precluded because of Detroit Edison's posting, bidding and seniority as described below — the *highest* pay grade is 5 ($4.32 per hour). For example, Building Cleaner is pay grade 2 ($4.03 per hour) and Building Attendant begins at pay grade 0 ($3.89 per hour). Coal-Ash Handler in Production (Central Heating) is pay grade 3 ($4.125 per hour) and Plant Cleaner begins at 2 and can advance to 3. High opportunity jobs have been and remain nearly all white.

16. As of April 24, 1973, there were 832 blacks out of 10,630 employees. As of April 24, 1972, there were 12 blacks and 1,099 whites in supervisory positions by the Defendant Detroit Edison Company. As of April 24, 1972, there were 73 blacks and 1,785 whites in professional and technical jobs. As of April 24, 1972 the 24, 1972, in bargaining unit jobs represented by Local 223, at the Delray Plant, there were 14 blacks and 113 whites. There are 9 white firemen earning $4.9 to $5.46 but there are no black firemen. There are 20 general mechanics A employees earning $5.26 to $5.93 but there are no blacks. There are seven white instrument men but no black. The greatest percentage of blacks at Delray are to be found at the plant cleaner classification where there are 4 whites and 2 blacks. At the Conner Creek Plant there are 156 whites and 20 blacks. There are 21 general mechanic A white employees but no blacks. There are 6 general mechanic apprentices but no blacks. There are 9 white instrument men but no black instrument men. Once again, the most significant percentage of blacks is to be found among plant cleaners where there are 7 white plant cleaners and 3 blacks. In the Marysville plant there are 142 white employees and 5 blacks. There are 22 white power plant operators and one black. There are 29 white assistant power

plant operators and two blacks. There are no blacks in the classification of turbine operator, auxilliary, combination firemen, senior plant operator, water tender, switchboard operator 1st, yard equipment operator, coal handling equipment operator, general mechanic A, general mechanic A apprentices, instrument man, plant warehouse man, and senior tool crib man.

17. In the Trenton production plant there are 225 white employees and 3 black employees. Once again there are no black employees with such classification as general mechanic A, and general mechanic A apprentice, and instrument man. The only classification in which blacks are present are plant cleaner, tool crib man and coal handling yard operator. In the St. Clair Plant, there are 178 white employees and 4 black employees. Three of these black employees are in the classification of plant cleaner and fourth is a serviceman. There are no blacks in the classication of general mechanic A, general mechanic A apprentices and instrument man.

18. In the River Rouge plant there are 99 white employees and 12 black employees. There are 17 white general mechanic A employees and one black general mechanic A employee. There are 6 general mechanic A white apprentices and one black general A apprentice. There are 17 white instrument A men and no black instrument employees. However, there are 3 white plant cleaners and 6 black plant cleaners, this classification once again providing the highest percentage of black participation. At the Industrial Power Plant & Penn Salt there are 52 white employees and 4 black employees. There are seven general mechanics A white employees and no general mechanic A black employees. There are 2 general mechanic A white apprentices and one general mechanic A black apprentice. At the Port Huron plant there are 13 white em-

ployees and no black employees. At the Monroe plant there are 100 white employees and 2 black employees. There are no black general mechanic A employees in these jobs at the Monroe plants. The 2 blacks are in the classification of plant cleaner and utility man. At the Wyandotte North Industrial plant there are 37 white employees and 5 black employees. At the Wyandotte South Industrial plant there are 50 white employees and 1 black employee.

19. At central Heating there are 87 white employees and 16 black employees. In the meter department there are 116 white employees and 10 black employees. Until approximately 1968 it was the practice of defendant Detroit Edison Company to deliberately exclude black employees from the meter department because of the fear of community reaction. Although seniority was not always adhered to in connection with job assignments in the meter department prior to the time that blacks were hired, once blacks were hired and protested the undesirable route into which they were placed because of their low seniority, defendants Detroit Edison Company and Local 223 refused to alter such assignments even though seniority was not uniformly adhered to in the past in connection with such assignments.

20. In the Stores Department there are 201 whites and 34 blacks. In the Transportation Department there are 92 whites and 22 blacks. The highest percentage of blacks is to be found in the Utility Servicemen classification where there are 19 whites and 13 blacks. Until some point subsequent to July 2, 1965, the Utilities Servicemen classification was one of low opportunity classifications to which blacks were assigned in the overwhelming number of instances. There are 47 white auto mechanics and one black auto mechanic. There are 4 white mechanic apprentices and 1 black mechanic apprentice.

21. In the electrical substations represented by Local 17, International Brotherhood of Electrical Workers, there are 334 whites and 15 blacks. There are no black journeymen first or second class and out of a total of 67 journeymen positions 3 are held by blacks. In the Transmission and Distribution and Overhead Department, represented by Local 17, IBEW, there are 741 whites employed and 21 blacks. There are 221 white journeymen linemen employed and 4 black journeymen linemen. Ninety-one apprentice linemen are employed and 6 blacks are so employed. There are 105 white journeymen linemen B Crew and 2 blacks. In most classifications in the department, no blacks are employed.

22. In the Transmission and Distribution Underground represented by Local 17, IBEW, there are 337 white employees and 38 blacks. In the journeymen and apprentice categories for cable splicers, there are 170 whites employed and 8 blacks. The most significant percentage of blacks in the department is to be found in the labor category where there are 5 blacks and 20 whites. In the construction field division represented by Local 223, Utility Workers of America, there are 851 whites employed and 50 blacks. Among electrical journeymen and apprentices there are 176 whites and 8 blacks. Among journeymen apprentice carpenters, there are 34 whites and 3 blacks. There are 34 whites and 4 blacks employed in the Pipe Cover Category. There are 31 white painters and 2 black painters. There are 24 Sheetmetal workers and 1 black Sheetmetal worker. There are 69 white welders and 3 black welders. There are 269 white mechanic fitter journeymen apprentices and 11 blacks.

23. In construction Shops Department represented by Local 223, there are 142 whites and 21 blacks. There are no black shop machinists. In the Customer Service Di-

vision there are 236 whites and 22 blacks. In the Meter Reading Department Districts there are 378 whites and 10 blacks. Except for 1 black at the River Rouge Plant, the classification of general mechanic A is all white. The classification of general mechanic A apprentices remains almost completely white.

24. In Transmission and Distribution and Overhead Department journeymen and apprentice linemen are almost all white. The same is true for most other classifications in the department. In Transmission and Distribution Underground, journeymen and apprentice cable splicer are almost completely all white classifications. In Construction, electricians, journeymen and apprentice, journeymen and apprentice carpenters, pipecoverers, sheetmetal workers, welders, and shop machinists are almost all white classifications. It would be fair to say that there is an almost complete statistical absence of blacks in most classifications.

25. In Buildings and Properties Department there are 141 whites and 78 blacks. The overwhelming majority of the blacks work as janitors, servicemen and elevator operators, which are the other categories in addition to those of utility servicemen and others referred to above, to which blacks were restricted in the overwhelming percentage of instances until some point subsequent to July 2, 1965.

26. Testimony at trial clearly shows that subsequent to July 2, 1965, defendant Detroit Edison Company had, and continues to have, a reputation in the black community in the Metropolitan area as an employer that generally does not hire blacks and continues to assign those blacks that are hired to low opportunity, non-promotable jobs such as those described above. Many blacks who have been hired at Detroit Edison believe that they are fortunate to be employed with Edison on any basis and they are afraid to protest the absence of blacks at Detroit Edison in numbers representative of their presence in the Detroit City population.

27. It is important to observe that until some point subsequent to July 2, 1965, all hiring interviewers who hired employees for defendant Detroit Edison Company were white. Through the present date no attempt has ever been made with either black or white interviewers to determine whether such interviewers are racially prejudiced nor have any steps been taken to correct such prejudice if it exists.

28. Applicants are asked if they have relatives employed by the Company. A percentage of employees hired by Detroit Edison have been hired as the result of contacts through friends and relatives. A study of the Federal Bureau of Investigation in the course of which 86 white employees were contacted indicates that 43 of such employees had friends and acquaintances who were employed by Detroit Edison and discussed job opportunities with such friends and relatives. Since a disproportionate percentage of employees at Detroit Edison Company are white and since the overwhelming percentage of employees in the higher opportunity jobs referred to above are white, such a hiring practice in this instance had the effect of perpetuating the exclusion of black applicants from employment with Detroit Edison Company and from the jobs referred to above.

29. Interviewers and supervisory personnel in high opportunity jobs and departments make the final decision regarding who is to be employed in such departments. Hiring takes place as the result of word-of-mouth recruitment. In order to advance to high opportunity jobs and departments such as Production, Construction, Transmission and

Distribution and Electrical Substations, employees must be hired into those departments at an entry level in practically every instance. All interviewers and supervisory personnel in departments which contain higher opportunity jobs are white. Supervisory personnel in departments which contain higher opportunity jobs are white. Supervisory personnel in such departments have no personal and social contact with blacks. Thirty-five and four-tenths percent of white employees who applied to Detroit Edison Company in 1969-1970 had relatives employed by the Company. Sixteen and three-tenths percent of such white employees had relatives in the same department where they sought employment. Thirty-seven and one-half percent of white employees have relatives employed by the Company. Fourteen and two-tenths percent of the white employees have relatives employed in the same department This phenomenon in practice perpetuates the racial composition of the work force. Until September, 1972, Edison's applicants were asked if they had arrest records. Interviewers, until the eve of the trial of this case, have been required to make extremely subjective judgments about an applicant's personality, appearance, dress and speech. There is no structured or written format for questions to be asked of applicants which is provided interviewers by the Company. Defendant Detroit Edison did not list employment vacancies with the Michigan Employment Security Commission until required to do so by law in late 1971 or early 1972.

30. After an employment application is rejected by Edison, an employee may renew his application by expressing continued interest in employment with the Company. An interviewer may mark an application "unrated". This generally means that the applicant cannot be considered further. If an interest in renewal of the applica-

tion is not expressed by the applicant, the unrated application will be destroyed at the end of a 6 month period. If a renewal of interest is expressed the unrated application will be held for another 6 month period. In 1968, 12.5 percent of white applicants and 22.5 percent of black applicants were unrated. In 1969 it was 10.9 percent for whites and 18.5 percent for 4 blacks. In 1970 it was 17.9 percent for whites and 26.9 percent for blacks. In 1969 and 1970, blacks hired at Detroit Edison Company continued to be disproportionately assigned to low opportunity jobs.

E. Testing

31. The only standards which Edison does apply uniformly in the selection of applicants are standards of performance on written mental ability tests which are administered to nearly all applicants who reach the final stage of consideration in the employment department before referral to line department supervisors for final consideration. (Tr. Vol. IX, pp. 129-130; Vol. VIII, p. 44-46).

32. The Company administers a variety of test batteries, each consisting of one or several tests, in its selection of new employees for entry level hourly paid and clerical jobs. The following table shows the test batteries which are administered to candidates for those entry, level jobs at issue here:

Test Battery	*Entry Level Job*
Mechanical Placement	Utility Serviceman, Appliance Repair, Meter Reader, Janitor, Construction Laborer, Warehouse & Yard Laborer, Metal Shop Helper, Stockman
Clerical Placement	Messenger, File Clerk, General Clerk, Telephone Clerk, Customer Telephone Rep., Commercial Office Rep., Computer, Programmer, FT Steno, FT Typist, Switchboard Operator, Tab Machine Operator, Janitor, Warehouse & Yard Laborer
Apprentice Lineman	Apprentice Lineman
Apprentice Draftsman	Draftsman General, Junior Draftsman, Rodman
Customer Serviceman	Customer Serviceman
Substation Operator	Substation Operator
Apprentice Cable Splicing	Laborer Conduit
Meter Reader	Meter Reader
Power Plant	Assistant Power Plant Operator, Substation Operator Trainee, Coal Ash Handler
Henry Ford Comm. College Proficiency Test	Construction Laborer

(Govt, Ex. 19)

33. A larger percentage of the black applicants for employment have failed these tests than the percentage of white applicants for employment who have failed them. Edison's employment department relies on its psychological services section for test administration and evaluation. (Tr. Vol. VIII, pp. 44-46). This section ordinarily evaluates an applicant's test performance by either reporting him as "acceptable" or "not recommended" depending on whether he has given sufficient numbers of right answers and thereby passed certain fixed standards of performance (Tr. Vol. XXI, p. 27). The following table shows for each test battery listed above, except the apprentice lineman's battery, the approximate proportion of white and black applicants taking each test who received evaluations of "not recommended" and were not hired in 1970 and 1971:

	1970		*1971*	
Test	*White*	*Black*	*White*	*Black*
Cable Splicer	31.8	66.7	29.2	67.3
Meter Reader	26.7	66.7	0	50.0
Draftsmen	0	0	15.8	25.0
Customer Serviceman	51.9	85.7	57.6	61.1
Power Plant Operator	37.8	77.0	37.5	61.9
Substation Operator Helper	44.6	78.9	42.9	69.8
Mechanical Placement	25.2	68.5	24.8	52.8
Clerical Placement	21.4	63.2	21.7	

(Gov. Ex. 91)

34. Although insufficient numbers of blacks have taken the apprentice lineman's battery to conclude from their performance that blacks have failed this battery more often than whites (Gov. Ex. 83), this test would exclude a greater percentage of blacks than whites if increased numbers of blacks were measured by it. This battery con-

sists only of tests which are also included in several other batteries which blacks have taken at Edison frequently, and they have consistently scored significantly lower on each of these tests in such batteries (Tr. Vol. IX, pp. 82-86; Gov. Ex. 83).

35. For most applicants, both black and white, meeting the prescribed cut-off scores or performance standards on test batteries they are given is a prerequisite for employment. While a small fraction of those applicants hired into some entry level jobs have not met all of the standards of performance on all of the tests in the batteries administered for their jobs, (Gov. Ex. 100), the overwhelming majority of those applicants who do not meet these standards are not employed in the occupations for which they are tested (Gov. Ex. 100; 91).

36. The Company has also administered an entrance examination for the Henry Ford Community College on which a passing score has been required as a condition of admission to courses offered there as part of the Construction and Maintenance Department apprenticeship training. Obtaining such a passing score has been an additional prerequisite for entry into these apprenticeship programs. (Tr. Vol. VII, p. 122). Among those employees who could be race identified who have taken this college entrance examination, the failure rate among blacks has been significantly higher than that among whites (Gov. Ex. 92).

37. Under guidelines promulgated by the Equal Employment Opportunity Commission, an employer may use a test which has the effect of excluding significantly larger numbers of blacks than whites only if the test has been shown to be a valid predictor of job performance. "Validity" as used by the Equal Employmeent Opportunity Commission means that the relationship of test scores to an appropriate criterion of job performance must, at a minimum, be statistically significant at the 95 percent level of confidence. Stated another way, this means that there must be no more than one chance in 20 that the relationship between test scores and the measure of job performance occurred by chance. *Guidelines on Employee Selection Procedures* (revised), 35 Fed. Reg. 12333, 29 C.F.R. 1607.5 (c) (1)

38. The EEOC *Guidelines* also require that validity be established separately or "differentially" for blacks where absence of sufficient numbers of blacks among those employed makes such differential validation infeasible, the tests in question may be regarded as valid on the basis of other evidence only provisionally until separate evidence of validity for the minority group is produced. A test which otherwise has the effect of under predicting the job performance of blacks should be scored in such a way as to correct this. 29 C.F.R. 1607.5 (b) (5)

39. Measurements of such relationships, often expressed as correlation coeficients, are determined by comparison of test scores and performance criteria measures for groups of individuals who have been tested and also rated on the job. A correlation coeficient is high or law depending on whether individuals in the group tend to have test scores and criterion ratings of corresponding levels (Tr. Vol. XXIII, pp. 156-160). It is possible for such a correlation to achieve the level of statistical significance required by the EEOC *Guidelines* while a substantial number of the individuals in the group among whom the correlation is computed have combinations of test scores and performance criterion ratings contrary to the trend, that is substantial numbers receiving high test scores may have lower

performance ratings than others who received lower test scores and substantial numbers who received low test scores may have received higher performance ratings than those receiving higher test scores (Tr. Vol. XXIV, pp. 4-5, 96-98, 104-109, Gov. Ex. 103, p. 345, Gov. Ex. 107).

40. The EEOC Guidelines, also require that cut-off scores or test standards must be related to "normal expectations of proficiency" in the work force and that they be reasonable, 29 C.F.R. 1607.6. Unless the relationship, or correlation, between test performance and criteria of job performance is very high, a reasonable cut- off score should eliminate only those applicants who are likely to be insufficiently qualified to perform the job satisfactorily (Tr. Vol. XXV, pp. 85-88).

41. None of the test batteries described in the preceding findings has been demonstrated both to be valid predictors of job performance, as measured by statistical comparison to criteria of job performance, and to be used with performance standards, or cut-off scores, reasonably designed to eliminate those applicants who are unlikely to perform satisfactorily in the jobs for which they are being considered and tested.

42. Differential validity, that is separate validity for blacks as a group apart from the general population of applicants and employees, has not been demonstrated for any of the batteries in issue here. Differential validation was attempted or evidence tending toward differential validation was presented, in only four of the studies described, the clerical and mechanical placement battery studies done by National Compliance Company (Gov. Ex. 102 pp. 115-139); the meter reader battery study and the assistant power operator studies done by Edison (Gov. Ex. 99, 101, Tr. Vol. XXII, pp. 22-23). These studies

were insufficient to establish validity for whites or blacks, and therefore they are deficient in evidence of differential validity (See Findings 99-105, 110, 113-114).

43. The customer serviceman battery, which is found to have been valid at the time of the study, apart from the lack of justification for its cut off scores, has not been demonstrated to be differentially valid for blacks as there is no evidence that there were blacks in the study group in 1965 (Tr. Vol.XXI, pp. 69-93).

44. Edison has made no effort to validate the Henry Ford Community College entrance examination (Tr. Vol. XVIII, pp. 6-133, Vol XXI, Vol. XXII, Vol. XXIII, pp. 5-47).

45. The only standards for selection of applicants for employment or transfer which are uniformly applied by the Company have been passing scores on batteries of mental ability tests administered by the Company. Because blacks generally score lower than do whites on many such tests, several of the test batteries used by Edison have screened out larger proportions of black applicants than of white applicants. With one exception, none of these test batteries are valid predictors of job performance; and without exception none of them are valid for blacks as a separate group. One of the batteries in fact may be "unfair" to blacks in that it under-predicts their performance relative to whites. Also without exception, all of these batteries are administered with cut-off scores which are unreasonably high, in that they screen out applicants whose scores are comparable to former and current employees who were not shown to be unable to perform in their jobs.

F. Specific Indicia of Union Involvement

46. Evidence submittted in this case shows that seniority, as defined by the collective bargaining agreement between Detroit Edison Company and Local 17 IBEW, is occupational group seniority and is the measure of seniority to be considered in matters of layoffs, rehiring, promotions and transfer within and among the occupational groups covered by the agreement. Promotions within each bargaining unit are awarded to the senior bidding employee possessing the required skills, abilities and/or adaptability. In a small percentage of the cases, less than 10 percent of them, the junior employees successfully bid for the job. The posting provisions of the agreement between defendants Local 17 and Detroit Edison Company provide that all permanent vacancies in the bargaining unit will be posted in all divisions of the department in which the vacancy occurs except in the case of the journeyment linemen classification. The promotion and posting provisions establish a priority for employees who are within the bargaining unit and the department for filling bargaining unit vacancies. If the Company is unable to fill the vacancy through either employees in the bargaining unit or department, the vacancy is posted for company-wide bidding. No preference is given to an employee who is not in the bargaining unit in which a vacancy occurs.

47. The record further reflects that under both the Local 223 agreements, an employee bidding from outside the bargaining unit or the department, should he be successful, is unable to carry with him any of the seniority he might have accumulated in his former job for purposes of both future promotions and bidding on vacancies in which the occupational group bargaining unit. His competitive status is lower than that of employees who are junior to him in the Company's service but who are nevertheless senior in the occupational group and/or bargaining unit or department seniority. Both Local 17 and Local 223 agreements with Detroit Edison Company do not protect the rate of an employee who is transferring to a high opportunity job in a new bargaining unit which has a rate lower than the job from which he is transferring. Accordingly, such an employee may suffer a reduction in economic benefits under this system, which provides for complete loss of seniority and pay reduction for black employees assigned to low opportunity jobs. Such blacks are being discouraged from applying for high opportunity jobs. Moreover, in many instances such black employees do not even have the opportunity to bid.

48. Seniority as defined in the collective bargaining agreement between Local 223 Utility Workers Union of America and Detroit Edison Company is once again occupational group seniority for the purpose of layoff, rehiring, promotions and transfers between bargaining units covered by the agreement. Promotions to vacancies within an occupational group within the bargaining unit are awarded on the basis of occupational group seniority. In less than 10 percent of the bidding situations a junior employee is chosen over a senior employee. Under the Local 17 agreement, the junior employee is successful in even fewer instances. The posting provisions of the collective bargaining agreements between Local 223 and Detroit Edison Company provide the vacancies within a bargaining unit which are not filled by an employee within the occupational group itself in which the vacancy occurs shall first be posted in the bargaining unit where the vacancy exists. When a vacancy is not filled through employees in the bargaining unit it may be posted in other

bargaining units in the same department and, at that point, the measure of seniority considered is Company service. If vacancies are not filled through this procedure the vacancy is posted companywide. This procedure makes it unlikely that blacks, who have been and are disproportionately assigned to lower opportunity jobs, will ever have the opportunity to bid for high opportunity jobs under either the Local 223 or Local 17 contract.

49. It was revealed at trial that under the Local 223 agreement those blacks in low opportunity jobs who are fortunate enough to have the opportunity to transfer must sacrifice seniority credits previously accumulated as well as their wage rate if the entry level in the high opportunity department pays less than the job which they hold. In most instances blacks in low opportunity jobs do not have the chance to transfer to high opportunity jobs because of the bidding and postings listed above. Seniority loss and wage reduction discourage transfers for those few blacks who obtain the chance to apply for transfers. Supervisors, more than 99 percent of whom are white, must sign a transfer bid before blacks can attempt to transfer from a low to a high opportunity job.

50. Defendant Detroit Edison Company claims that it follows a policy of promotion from within. Yet its collective bargaining agreements make unlikely or impossible promotion from within of blacks who continue to be disproportionately assigned to low opportunity jobs and who are either completely excluded from or have taken responsibility in the high opportunity jobs described above. Rather than promote blacks from within the Company, Detroit Edison sometimes hires skilled tradesmen from Canada who cannot even speak English. Additionally, Detroit Edison deliberately recruits blacks with poor em-

ployment records, when it has on its payroll blacks with good employment records who cannot obtain promotion and transfer because of the intentional and unintentional discrimination on account of race.

51. Defendant Utility Workers Union, Local 223, has misinformed black members by advising such members that unsuccessful bids involving jobs outside their departments cannot be put through the grievance procedure under the collective bargaining agreement. Black employees have been discouraged from filing grievances and have not sought to use the grievance procedure to obtain relief from discrimination because of their lack of confidence in defendants Local 223 and Detroit Edison Company. Local 223 has insisted upon strict adherence to seniority for black meter readers consigned by that system to undesirable routes when seniority had not been followed uniformally for white meter readers before blacks were hired. Defendant Local 223, Utility Workers Union of America and Detroit Edison Company have deliberately gerrymandered seniority districts so as to deny black union members promotional opportunities in the better paying jobs. Defendant Local 223 has negotiated and acquiesced in discriminatory seniority, bidding and posting procedures which have the effect of locking blacks into low opportunity jobs. Defendant Local 223 apparently has never protested Detroit Edison Company's hiring or promotional policies with the Company itself, before any administrative agency—federal or state; or before any court.

52. The president of Local 223 was the only member of the Utility Worker's Executive Committee to vote against the establishment of a human rights committee for that Union. The Local president, Pete Johnson, has insist-

ed upon rerun elections only for black officials of Local 223. Johnson and Local 223 have attempted to exclude blacks from leadership positions and Local 223 has failed to take action to discourage the hostility and threats of white members from Local 223 made against black members of Local 223.

53. Defendant Local 17 IBEW has negotiated seniority and posting provisions in its collective agreement which have the effect of locking blacks into low opportunity jobs. Defendant Local 17 has never protested Detroit Edison Company's hiring or promotion policies with the Company itself; before an administrative agency—federal or state; or before any court. Defendant Local 17 refers workers to defendant Detroit Edison Company and thus directly aides and abets Edison's discriminatory hiring.

G. Deficiencies of Affirmative Action Program.

5. Detroit Edison Company's affirmative action program involves a sporadic and occasional effort to publicize job opportunities in the black community in the Metropolitan Detroit Area and is therefore inadequate. The Detroit Edison Company has never made use of black radio stations to advertise employment opportunities at Detroit Edison Company; in fact, the Company has done nothing at all which has produced fruitful results. Defendant Detroit Edison has at various times rejected the suggestions of the plaintiff Stamps and other employees that the Company establish a training program, if blacks were indeed unqualified and that a special coordinator be assigned to deal with problems of black employees.

V. Discussion of Applicable Law.

The courts have recognized that racial discrimination in employment is class or group discrimination. See, e.g., *Jenkins v. United Gas Corp,* 400 F. 2d 28 (5th Cir. 1968); *Otis v. Crown Zellerbach,* 398 F. 2d 496 (5th Cir. 1968); *Blue Bell Boots v. EEOC,* 419 F. 2d 355 (6th Cir. 1969). It is Title VII of the 1964 Civil Rights Act which provides the broadest legislative mandate for eliminating racially discriminatory practices in employment.

Courts have frequently relied on statistics in the employment discrimination area because of the difficulty involved in establishing unlawful action in connection with a wide variety of individual acts where both records and witnesses may not be available after a substantial period of time and where the employer or union has primary or exclusive access to the relevant information. See, e.g., *Mabin v. Lear Siegler, Inc.,* 457 F. 2d 806 (6th Cir. 1972). The principle that "the preponderance of Negroes in lower-paying and inferior jobs, while white workers have the better work, ought to establish a *prima facie* case for Title VII violation" has now been accepted in connection with promotion as well as hiring by most of the U. S. Circuit Courts of Appeal. Gould, "Seniority and the Black Worker," 47 *Texas L. Rev.* 1039 (1969). There is virtual unanimity on the proposition that the statistical absence of blacks disproportionate to whites makes out a Title VII and Civil Rights Act of 1866 violation. See for instance, *Mabin v. Lear Siegler, Inc., Supra; United States v. St. Louis-San Francisco Ry.,* 464 F. 2d 301, 307 (8th Cir. 1972) cer. denied 93 S. Ct. 913 (1973); *Brown v. Gaston County Dyeing Mach. Co.,* 457 F. 2d 1377, 1382 (4th Cir. 1972); *United States v. Hayes International Corp.,* 456 F. 2d 112 (5th Cir. 1972); *United States v. Ironworkers Local 86,* 443

F. 2d 544, 550 (9th Cir.), cert. denied 404 U.S. 984 (1971); *Jones v. Lee Way Motor Freight, Inc.*, 431 F. 2d 245, 247 (10th Cir. 1970) cert. denied 401 U.S. 954 (1971); *U. S. v. Chesapeake & Ohio Ry. Co.*, 5 FEP Cases 311 (4th Cir. 1972).

Significantly, the United States Court of Appeals for the Eighth Circuit has gone further than the above-cited cases, stating in *Parham v. Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970) as follows:

> "We hold as a matter of law that these statistics, which reveal that an extraordinary small number of black employees, except for the most part as menial laborers, established a violation of Title VII . . ." Id. at 426.

Parham, then, concludes that statistics showing "an extraordinarily" small number of blacks *proves* a violation rather than merely establishing a *prima facie* case. Even when statistics are not taken to conclusively establish discrimination—though the percentage of black workers may be extremely small—they should be given proper effect by the court when valid, and should be weighed by the court together with the testimony of witnesses. See *Jones* v *Lee Way Motor Freight, Inc., supra* at 247. In *Jones*, a case that differs from the instant case in which statistics have been buttressed by witnesses' testimony the court set forth the following language:

> "True, no specific instances of discrimination have been shown. However, because of the historically all-white makeup of the Company's line driver category, it well may be that Negroes simply did not bother to apply." Id. at 247.

The Court in *Jones*, therefore, seemed to conclude that "statistics establish a *prima facie* case even in the absence of the kind of testimony which in the absence of the kind of testimony which is in the record in the instant case. Id. at 247. Also pertinent is *United States v. Sheet Metal Workers, International Local Union 36*, 416 F. 2d 123 (8th Cir. 1969), where the court, once again finding violation where the record was "void of specific instances of discrimination" subsequent to July 2, 1965, the effective date of Title VII, stated that

> "The Act, in our view, permits the use of evidence of statistical probability to infer the existence of a pattern of practices of discrimination." Id. at 127, n. 7.

Statistics in this case establishing *prima facie* discrimination demonstrate the following: (1) a severely disproportionate and small number of blacks in the labor market area; (2) a severely disproportionate and small number of blacks employed in Edison high opportunity jobs and departments; (3) the number and percentage of blacks hired declined subsequent to the introduction of the race identification system in the 1950's; (4) a higher percentage of black applicants continue to be unrated as compared to white applicants.

The statistics indicate that *prima facie* violations were made out with regard to defendants not only in the past but in the present as well. Unlike *Parham*, for instance, where present discrimination could not be found because of the substantial improvement in the company's hiring patterns, in this case present as well as past discrimination is made out on the basis of statistics. This is dramatically demonstrated not only by the continued absence of blacks from professional, supervisory and skilled trades jobs,

but also by Government's exhibit 65 which indicates that employees hired during the years 1969 and 1970 into the high opportunity jobs—especially in departments like Construction and Maintenance, Transmission and Distribution Overhead Lines and Underground Lines—continue to be predominantly white. (Indeed, most of the improvements in Detroit Edison's hiring policies took place subsequent to January 6, 1971, the date when plaintiffs filed administrative unlawful employment practices charges with both the U. S. Equal Employment Opportunity Commission and the Michigan Civil Rights Commission.)

No attempt was made by the defendants to rebut and overcome plaintiffs' *prima facie* case. No attempt was made, as was done in *United States* v *Jacksonville Terminal Co.*, 451 F. 2d 418 (5th Cir. 1971) cert. denied 406 U.S. 906 (1972), to introduce evidence showing that whites with superior qualifications or qualifications at least arguably equal were chose for jobs from which blacks were excluded. This approach would have been completely futile for the defendants for two principal reasons: (1) defendants testified that employees are trained for positions of responsibility including skilled jobs without having to possess prior experience in advance of applying inasmuch as employees are promoted to supervision and skilled trades positions from within the Company. Accordingly, unlike *Jacksonville Terminal* where defendants were attempting to pick the "best qualified" employees on the basis of selecting those who had had previous experience in the industry or related work in other industries, defendants select employees whom they will train: (2) Government exhibits make clear that a substantial number of black employees who are held into low opportunity jobs had qualifications based upon both prior work experience and education which are demonstrably superior to a substantial number of whites who

had been selected for skilled trades jobs. See Government Exhibits 14 and 15. Thus, the defendants—as was generally the case with regard to their response to testimony by individuals—did not rebut any of the inferences of discrimination that were created by virtue of statistics. Discrimination on the part of defendants can be found on the basis of the statistics noted above alone.

Although none of the statistics were rebutted, the Government and private plaintiffs went further and introduced evidence of both unintentional and intentional discrimination which substantially buttressed the statistics. Defendant Detroit Edison's only response to the statistics has been its argument that a disproportionately small number of blacks is not employed at Detroit Edison since the area that must be considered is the area to which Edison supplies electricity rather than the labor market area. Private plaintiffs correctly point out that under this inadequate theory, the computation of statistics for a General Motors plant in Detroit, for instance, would not be based upon the working population in the Detroit are but rather any portion of the United States to which General Motors products were shipped. Significantly, the Ninth Circuit Court of Appeals in *U.S.* v *Ironworkers Local 86, supra,* indicated that where a union's jurisdiction covered the Seattle Metropolitan area that only the City of Seattle might be considered on the theory that most members came from the City itself. The notion that the construction industry's product market should be utilized was not even considered. The defendant Detroit Edison seeks to rely on the district court's citation in *U. S.* v *Virginia Electric & Power Co.*, 327 F. Supp. 1034 (E.D. Va. 1971), of the fact that the area served by the utility in that case was 18.6 percent black. But the court in that case did not rely on the figure to derive a statistical imbalance which would

create a *prima facie* case of a violation. Indeed, a careful reading of the opinion indicates that such statistics were not relied upon in any way.

Defendant Detroit Edison Company employs subjective criteria for both purposes of hiring and promoting its employees and its bargaining unit and supervisory personnel—inasmuch as no specific instructions are given to interviewers to determine the qualifications of applicants and no objective criteria is employed by the Company as it decides who should be promoted to supervisory positions. As the Fourth Circuit Court of Appeals has said in *Brown v. Gaston County Dyeing Machine Company, supra:*

> "Elusive, purely subjective standards must give way to objectivity is statistical indicia of discrimination are to be refuted . . . [I]n the absence of objective criteria applied to all workers alike, the statistics indicate that race is the only identifiable factor explaining the disparity between the jobs held by white employees and jobs held by black employees. The proof discloses no objective standards based upon education, experience, ability, length of service, reliability, or aptitude to account for the actual employment of white workers . . .
>
> In sum, the lack of objective guidelines for hiring and promotion and the failure . . . are badges of discrimination that serve to corroborate, not to rebut, the racial bias pictured by the statistical pattern of the Company's work force." Id. at 1382-83.

This skepticism of subjective criteria can well be understood in the context of this case where high opportunity departments are staffed by an all white interviewing and supervisory staff and where permission prerequisite for

applying for a transfer must be granted by an almost entirely all-white supervisory workforce. As stated by Judge Brown, speaking for an unanimous court in *Rowe v. General Motors Corp.*, 57 F. 2d 348 (5th Cir. 1972):

> ". . . Blacks may very well have been hindered in obtaining recommendations from their foremen since there is no familial or social association between these two groups. All we do today is recognize that promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against blacks much of which can be covertly concealed and, for that matter, not really known to management. We and others have expressed a skepticism that black persons dependent directly upon decisive recommendations from whites can expect non-discriminatory action." Id. at 359.

Chief Justice Burger, speaking for an unanimous Supreme Court in *Grings v. Duke Power Co.*, 401 U. S. 424 (1971), held that in the area of employment discrimination, good intent or the absence of discriminatory intent does not redeem employment procedures or testing mechanisms that are unrelated to measuring job capability. "The *only* justification for standards and procedures which may, even inadvertently, eliminate or prejudice minority group employees is that such standards or procedures arise from a non-discriminatory legitimate business necessity." *Rowe v. General Motors Corp., supra,* at 354. The Court in *Griggs* was careful to emphasize that

> "Congress directed the thrust of the Act at the *consequences* of employment practices—not simply to motivation. More than that, Congress has placed upon the employer the burden of showing that any given

requirement must have a manifest relationship to the employment in question." Id. at 432.

The record in this case amply evidences the kind of situation that can develop when a large employer relies upon subjective criteria and utilizes employment procedures which have no business necessity. The record in the instant case demonstrates that Detroit Edison has an all white management and a nearly all-white supervisory workforce. The record further demonstrates the management is represented in its dealings with defendant unions only by whites and, with the exception of plaintiff Willie Stamps, the unions are represented only by whites.

This Court certainly has the authority to grant relief in a case such as this where there is racial discrimination in employment based on the use of subjective criteria. The Sixth Circuit Court of Appeals in *U.S. v. IBEW, Local 38,* 428 F. 2d 144 (1970 cert. denied 400 U.S. 943 (1970)), has indicated that district courts may utilize broad affirmative relief under Title VII to enjoin the "continuation of effects of past discrimination resulting from present practices (neutral on their face) which have the practical effect of continuing past injustices." Id. at 149. The Sixth Circuit in *Local 38* indicated that one such practice—present in the instant case as well—is the "administration of qualification examinations which had no objective standards and which produced unexplained discriminatory results." Id. at 150.

The defendant Detroit Edison discriminates in numerous ways in addition to its utilization of subjective criteria. The Government's exhibits clearly demonstrate that preference in both hiring and assignment to designate departments is given to the friends and relatives of incumbent employees. This results from the fact that a substantial

number of applicants who are hired are notified of job opportunities in the Company or particular departments by friends or relatives; Company witnesses admitted that employees were hired into high opportunity jobs and departments by word of mouth. The courts have regarded such neutral practices as unlawful where engaged in within the context of past discrimination; and word of mouth hiring is to be condemned when it produces such results as it does in this case. See, e.g. *Parham v. Southwestern Bell Telephone Co. supra; Heat & Frost Insulators v. Vogler,* 407 F. 2d 1047 (5th Cir. 1969). As noted by the court in *U. S. v. Carpenters Local 169,* 457 F. 2d 210, 215 n. 8 (7th Cir. 1972), where defendant "opens its doors to a token number of blacks, nepotism applied evenly tends to solidify the miniscule percentage of blacks."

There is also much testimony in the record by numerous individuals as to individual acts of intentional discrimination and such testimony was not rebutted in any way by the defendants. The amount of evidence indicating intentional discrimination is surprising because intentional discrimination is usually difficult to demonstrate; proof of "overt racial discrimination in employment is seldom direct." *Brown v. Gaston County Dyeing Machine Company, supra,* 518. The weight of the evidence presented by the testimony of blacks indicating that they possessed work experience and qualifications for the jobs for which they applied but were rejected, constitutes a *prima facie* violation of the law—inasmuch as no attempt was ever made by the defendants to introduce any evidence showing that the witnesses' testimony was incorrect or incomplete or that white employees with superior or equal qualifications were chosen (or that black employees were chosen for such jobs). Since no rebuttal evidence was offered, the testimony of the individually named private plaintiffs and other blacks

who testified stands uncontradicted, and the allegations of discrimination must be sustained under the standards established by the Supreme Court for non-class individual discrimination cases in *McDonnell Douglas Corp. v. Green* 5 FEP Cases 966 (May 14, 1973). The Court in *Green* stated that once the employer decided to seek someone with the respondent's qualifications, the burden then shifts to the employer to articulate some non-discriminatory reason for respondent's rejection. Id. at 970. It should be noted that the intentional or deliberate discrimination demonstrated by this record is not necessary for a violation and the ordering of relief under Title VII. That such discrimination has occurred, and, in some instances, continues to occur subsequent to the filing of the charges in this case, demonstrates how flagrant has been, and continues to be, Defendant Detroit Edison's violation of the law.

The evidence in this case shows that blacks have been damaged by both of the collective bargaining agreements negotiated by Detroit Edison Company, the effect of which is to give preference for job bidding inside all the predominantly white departments to the employees in such departments and job classification. Since blacks have not been hired into such jobs and departments as Construction and Maintenance, Transmission and Distribution Overhead and Underground Departments, the effect is to make it impossible or extremely unlikely that blacks will have an opportunity to be considered for promotion at all. This makes the instant case much more severe in terms of limiting black promotion opportunities than the leading and traditional seniority cases like *Quarles v. Philip Morris Inc.*, 279 F. Supp. 505 (E.P. Va. 1969) and *Local 189 United Papermakers v. United States*, 416 F. 2d 980 (5th Cir. 1969) cert. den. 397 U. S. 919 (1970). Those cases dealt with

fact situations where defendant unions and companies were willing to permit unimpeded transfer rights for black employees who had been hired into low level jobs—the disputes concerned simply union and company insistence upon the denial of seniority credits to blacks and the refusal to preserve their wage rate upon transfer. Here there is much more than that. For in this case, the effect of the collective bargaining agreement is not only to deprive incumbent black employees of seniority credits which they have accumulated in previously segregated jobs, but also to completely preclude the opportunity to transfer by bidding procedures which provide preference for incumbents and in most instances, no notice of job opportunity for employees in other departments. See *Bing v. Roadway Express, Inc.*, 444 F. 2d 687 (5th Cir. 1971); *Witherspoon v. Mercury Freight Lines*, 457 F. 2d 496 (5th Cir. 1972). *Belt v. Johnson Motor Lines, Inc.*, 458 F. 2d 443 (5th Cir. 1972); *Jones v. Lee Way Motor Freight Co., supra; U. S. v. St. Louis-San Francisco Ry. Co., supra* and *U. S. v. Jacksonville Terminal, supra.*

Additionally, it is clear that if a black incumbent is fortunate enough to have the opportunity to bid on the all white skilled trades jobs and to surmount the considerable obstacles involved in bidding successfully, the employee must give up seniority credits previously accumulated in the job or department to which he has been consigned. Since the black employees locked into low opportunity jobs at Detroit Edison until sometime subsequent to July 2, 1965, were discriminated against in hiring by being consigned to certain jobs, loss of seniority credits when transferred to the all white skilled trades departments penalizes black employees and discourages them from applying by depriving them of competitive status seniority credits which would have been theirs had it not been for the

hiring discrimination which existed in the first instance. This is to say, had there been no discriminatory hiring policy which relegated blacks to the low opportunity jobs, black employees would be fairly represented throughout Edison, having been given an equal opportunity in the first instance, in other departments. Once hiring discrimination is in evidence as is reflected from the record and testimony in this case, a seniority system which discourages and makes unlikely a transfer for blacks is unlawful.

As stated by Judge George Edwards for an unanimous court in *Bailey v. American Tobacco Co.*, 4 FEP Cases 916 (6th Cir. 1972):

> "It is clear that a present non-discriminatory seniority provisions, which has no race discrimination features on its face, may nonetheless be a violation of the Equal Employment Opportunities Act if it serves to preserve the long-standing effect of past discrimination." Id. at 917.

"When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, these policies must yield, unless there is an overriding legitimate, non-racial purpose." *Local 189 United Papermakers v. United States*, 416 F. 2d 980, 989 (5th Cir. 1969), cert. den. 397 U. S. 919 (1970). See also *U. S. v. IBEW, Local 38*, 428 F. 2d 144 (6th Cir. 1970) cert. denied, 404 U.S. 943 (1970); *E.E.O.C. v. Plumber, Local 189* 438 F. 2d 408 (6th Cir. 1971) cert. denied, 404 U. S. 832 (1971); *U. S. v. Roadway Express Inc.*, 4 FEP Cases 643 (6th Cir. 1972).

Plaintiffs have contended through the proceeding in this case that the written tests utilized by Detroit Edison Company violates Title VII and does not meet the standards

of *Griggs v. Duke Power Co., supra* and the Equal Employment Opportunity Guidelines. It is indisputable that Detroit Edison had used its written examinations to "freeze the status quo" of past discrimination and that such has resulted in a differential impact upon the races. By demonstrating a "freezing" of the *status quo* and a differential impact upon the races, plaintiffs have met the burden imposed by *Griggs*. However, the defendant Detroit Edison has come forth with no written reports as required by EEOC Guidelines to substantiate the unsupported assertion of its employed psychologist that written examinations at Edison have been validated. (It should be noted that *Griggs* approved of the EEOC Guidelines.) The written examinations are unsatisfactory with regard to differential validity as well as other areas. See EEOC Guidelines 35 C.R.R. S 1967.5(b). See also *U. S. v. Georgia Power Co.* 6 FEP Cases 587 (5th Cir. 1973); *U. S. v. Jacksonville Terminal Co.* 451 F. 2d 418, 456 (5th Cir. 1971); *Moody v. Albemarle Paper Co.* 5 FEP Cases 613 (4th Cir. 1973); *Robinson v. Lorillard Corp.* 444 F. 2d 791, 798 n. 7 (4th Cir. 1971). See generally, Cooper and Sobel, "Seniority and Testing Under Fair Employment Laws; A General Approach to Objective Criteria of Hiring and Promotion," 82 Harv. L. Rev. 1598 (1959); Comment, "Employment Testing; The Aftermath of *Griggs v. Duke Power Co.*," 72 Colum. L. Rev. 900 (1972).

Although the National Labor Relations Act is applicable in cases of this kind to the unions conduct in the area of racial discrimination in employment, the Taft-Hartley Act makes the employers liable as well for the conduct engaged in this case. Both unions have violated the National Labor Relations Act by failing to represent fairly all employees within the bargaining unit. *Steele v. Louisville & National Ry Co.* 323 U. S. 192 (1944). The practices of Local 223

are comparable to those described in *Steele* that they involve intentional as well as unintentional discrimination; the refusal to process grievances of blacks, the negotiation of discriminatory seniority provisions, the failure to accord black meter readers the rights that whites had, the gerrymandering of seniority districts, and the exclusions of blacks from political office all contribute a pattern that make this case similar to *Steele*. Both Local 223 and Local 17 are liable for their negotiation of discriminatory seniority provisions and for acquiescence in racial discrimination. The unions have failed in their obligation under the National Labor Relations Act and Title VII to protest racially discriminatory employer hiring practices which interfere with the right of black applicants or black employees outside of the union's own bargaining unit to be hired or to be promoted. An obligation is imposed on Local 223 and Local 17 to raise the subject matter of racial discrimination in hiring under the National Labor Relations Act as part of the duty of fair representation doctrine as well as under Title VII.

In light of the foregoing legal authority findings of fact, it is obvious that the defendants have violated Title VII of the Civil Rights Act of 1964 and the National Labor Relations Act, as well as Section 1981 of the Civil Rights Act of 1968, which provides that all persons within the jurisdiction of the United States shall have the same right to make and enforce contract.

VI. *Conclusions of Law*

1. This Court has jurisdiction of this action under Section 707(b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-6(b).

2. The Attorney General of the United States is authorized to institute this action on behalf of the United States under Section 707(b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e6(b) to obtain relief from a pattern or practice of resistance on the part of the defendants to the full enjoyment of the rights to equal employment opportunity secured by Title VII of that Act.

3. Defendant Detroit Edison Company is an employer within the meaning of 42 U.S.C. 2000e-(b) and is engaged in an industry affecting commerce within the meaning of 42 U.S.C. 2000e-(h).

4. Defendant Unions are labor organizations within the meaning of 42 U.S.C. 2000e-(d) and are engaged in an industry affecting commerce within the meaning of 42 U.S.C. 2000e-(h).

A. Unlawful Assignment Discrimination

5. Defendant Detroit Edison's practice of failing to consider blacks for its high opportunity jobs, while assignment them to the low opportunity jobs of: building cleaner, lamp changer, janitor, elevator operator, wall washer and serviceman in the Buildings and Properties Department; plant cleaner and coal and ash handler-Central Heating in the Production Department, and any job in the Stores and Transportation Department except for the jobs in the auto mechanic group, while at the same time assigning large numbers of white employees who are not better qualified to highly paid, high opportunity jobs and lines of

progression, is an unlawful employment practice in that it classifies and segregates these employees in such a way that they are deprived of equal employment opportunities in violation of Section 703(a) (2) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-(2)a(2). *Local 189, United Papermakers* v *United States,* 416 F. 2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919; *Clark* v *American Marine Corp.,* 304 F. Supp. 603 (E.D. La., 1969), aff'd per curiam, 437 F. 2d 959 (5th Cir., 1971).

6. Statistical evidence is sufficient to establish a prima facie case of racial discrimination in job assignments. *United States v. Chesapeake & Ohio Railway Co.* 471 F. 2d 582 (4th Cir. 1972); *United States* v *Hayes International Corp.,* 456 F. 2d 112 (5th Cir. 1972); *United States v. Ironworkers Local 86,* 443 F. 2d 544 (9th Cir. 1971); *Jones* v *Lee Way Motor Freight, Inc.,* 431 F. 2d 245 (10th Cir. 1970).

7. The fact that some whites as well as blacks were assigned to some of the low opportunity jobs to which blacks were assigned does not overcome the inference that blacks were assigned to those jobs because of their race. *Jones* v *Lee Way Motor Freight, Inc.,* 431 F. 2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971); *United States v. Bethlehem Steel,* 312 F. Supp. 977 (W.D. N.Y., 1970) reversed in part on other grounds, 446 F. 2d 652 (2nd Cir. 1971).

8. The systems of job posting and seniority established by Edison's General Order 203 and by its collective bargaining agreements with Local 17 and Local 223, grant preference to whites already employed in high opportunity occupational groups, bargaining units and departments over blacks assigned to low opportunity jobs who seek to transfer to high opportunity jobs. The seniority systems

also penalize blacks who transfer by denying them credit for time spent in their former occupation groups, bargaining units and departments. Such posting and seniority systems, although racially neutral on their face, are unlawful in that they perpetuate the effects of past discrimination in assignment. *Bailey* v *American Tobacco Co.,* 462 F. 2d 160 (6th Cir. 1972); *Local 189* v *United States, supra; Quarles* v *Phillip Morris Inc.,* 279 F. Supp. 505 (E.D. Va., 1968): *United States v. Bethlehem Steel,* 446 F. 2d 652, (2nd. Cir. 1971); *United States* v *N.L. Industries,* .... F. 2d ..... (7th Cir. 1973) 5 [CCH] EPD ¶ 8529; *Bowe* v *Colgate Palmolive Col,* 416 F. 2d 112 (5th Cir. 1972).

9. Each defendant, subsequent to the passage of the Civil Rights Act of 1964, has negotiated and executed collective bargaining agreements which provide for an occupational group and bargaining unit seniority system and has contributed to the continuation and operation of the system, and has therefore intentionally engaged in unlawful employment practices within the meaning of Section 707(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-6(a) *Local 189* v *United States, supra; Robinson* v *P. Lorillard,* 444 F. 2d 791 (4th Cir. 1971).

10. The job posting and seniority systems in effect at Edison are unlawful despite the fact that they may not have been a total deterrant to blacks' attempts to transfer and some blacks have overcome their disadvantages to progress from low opportunity occupation groups and departments. *United States* v *Bethlehem Steel Corp.* 446 F. 2d 652 (2nd Cir. 1971).

B. Unlawful Hiring Discrimination

11. Where Edison's work force is 92 percent white and qualified blacks are available in the relevant labor market in far greater proportion, its reliance on friends and relatives of incumbent employees as its principal recruiting source for much of its hiring and for a majority of hourly paid positions and its preference for them over other applicants is a failure to hire and a limiting of applicants for employment which adversely affects their opportunities because of their race in violation of Section 703(a)(1) and (2) of Title VII, 42 U.S.C. 2000e (2)(a)(1) and (2). *United States v. Chesapeake & Ohio Railway, supra; Local 53 Asbestos Workers* v. *Vogler* 407 F. 2d 1047 (5th Cir. 1969). *Parham* v. *Southwestern Bell Telephone Co.* 433 F. 2d 421 (8th Cir. 1970).

12. In light of Edison's practice of friends and relatives recruiting, its failure to advertise job opportunities generally, and its reputation of excluding blacks, Edison cannot claim a lack of black applicants as a defense for its failure to hire them. *United States* v. *Sheet Metal Workers Local 36,* 416 F. 2d 123 (8th Cir. 1970); *Jones* v. *Lee Way Motor Freight, supra; Cypress* v. *Newport News General and Non-Sectarian Hospital,* 375 F. 2d 648 (4th Cir. 1967).

13. Where few blacks are hired overall and none have been hired in some departments and ultimate hiring authority is left with white supervisors, it must be inferred that these supervisors have resisted the hiring of blacks for reasons of race, and the continuation of this practice is unlawful. *Rowe* v. *General Motors,* 457 F. 2d 348 (5th Cir. 1972).

C. Unlawful Testing Practices

14. Because the following test batteries: mechanical placement, clerical placement, cable splicer, apprentice lineman, meter reader, substation operator, assistant power plant operator, customer serviceman, and the Henry Ford Community entrance examination, used by Edison in selecting among applicants for hire or for transfer, are demonstrated to have the effect of screening out greater proportions of black applicants than of white applicants, it becomes Edison's burden to prove that these test batteries are valid predictors of job performance, for black as a separate group where feasible, and that the cut off scores or selection standards applied are related to a level of proficiency reasonably to be expected of employees on the job. *Guidelines on Employee Selection Procedures,* 29 C.F.R. 1607.3, 1607.5, 1607.6; *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971); *United States* v. *Georgia Power Co.,* .... F. 2d ....., 5 EPD [CCH] ¶ 8460 (5th Cir. No. 71-3447, 1973); *Moody* v. *Albemarle Paper Co.* 474 F. 2d 134 (4th Cir. 1973); *U.S.* v. *Jacksonville Terminal,* 451 F. 2d 418 (5th Cir., certiorari denied, 406 US 906).

15. The level of "validity" as predictor of job performance which a test must have should be demonstrated by evidence of a correlation between a significant sample of employees' test scores and their ratings on a measurement of an important criterion of job success which correlation can be demonstrated to have both statistical significance at the 5 percent level and practical significance. *Guidelines,* 29 C.F.R. 1607.5(c)(1) and (2). *United States* v. *Georgia Power Co. supra.*

16. Any demonstration of validity should include the presentation of written results of a validation study in-

cluding graphical and statistical information and objective descriptions of the procedures followed and reasonably complete reporting of the data on which the study is performed and how it was gathered. *Guidelines* 29 C.F.R. 1607.6. In addition any validation study, in order to be probative, must compare performance criteria ratings with test results as they are actually used rather than with test results evaluated by a hypothetical model. *United States* v. *Georgia Power Co., supra.*

17. Unless a test can be demonstrated to have an extraordinary high relationship to job performance, reasonable cut-off scores should eliminate only those applicants who are likely to be unable to perform sufficiently well on the job to be consistent with the necessities of safety and efficiency. *Guidelines* 29 C.F.R. 1607.6; *Griggs* v. *Duke Power Co., supra.*

18. None of the test batteries which were demonstrated to have the effect of screening out higher percentages of blacks than of whites, with the exception of the customer serviceman's battery, were proved to be valid predictors of job performance in accordance with the *Guidelines, supra,* by means of probative evidence, including written reports of validation studies, showing statistically and practically significant relationships between job performance and test scores as they are actually used. The continued use of these test batteries without such proof of validity is unlawful. *Griggs* v. *Duke Power Co., supra; United States* v. *Georgia Power Co., supra; Moody* v. *Albermarle Paper Co., supra.*

19. None of the test batteries here in issue were demonstrated to be administered with cut-off scores which are reasonable in that they screen out only those applicants likely to possess insufficient ability to perform on the job.

On the contrary, in the case of each of these test batteries the cut-off scores were demonstrated to be so high as to reject applicants whose scores are equal to the scores of employees who have been sufficiently able to perform in the past. The continued use of these test batteries, even if demonstrated to be valid predictors of job success, without adjusting their cut-off scores to a more reasonable level is unlawful. *Griggs* v. *Duke Power Co. supra.*

20. In the three job areas, general mechanical occupations, general clerical occpations, and the power plant operator group, where sufficient numbers of blacks are employed to make differential validity studies technically feasible, Edison attempted such differential studies but failed to establish differential validity because the studies were insufficient to establish validity in general. In those area where insufficient numbers of blacks are employed to make differential validity feasible, Edison's unlawful practices of racial exclusion are the cause of this absence of sufficient number of black employees. This lack of differential validation is an additional reason why the continued use of these test batteries as selection devices is unlawful. *Guidelines* 29 C.F.R. 1607.5(b)(5); *United States v. Jacksonville Terminal Co., supra.*

D. Necessary and Appropriate Relief

21. Where an employer and labor organizations have to have engaged in unlawful employment practices under Title VII, the courts have the authority and duty to enter a decree which not only prevents future discrimination, but which also corrects insofar as feasible the effects of past discrimination. *Local 53, Asbestos Workers* v. *Vogler, supra; United States* v. *Carpenters Local 169,* 427 F. 2d 210 (7th Cir., 1972), *cert. denied,* 41 U.S.L.W. 3184 (1972); *United States* v. *Ironworkers Local 86,* 315 F. Supp. 1202

(W.D. Wash. 1970). See also, *Louisiana* v. *United States*, 380 U.S. 145, 154.

22. Where an unlawful system of promotion and transfer based on occupational group and bargaining unit job posting and seniority exists, members of the affected class of blacks who were assigned to low priority jobs because of their race should be provided an opportunity to bid on the high opportunity jobs from which they have been excluded, on the basis of total length of service with the Company and without loss of pay where they are successful. *Local 189 v. United States, supra, Long v. Georgia Kraft*, 450 F. 2d 557, (5th Cir. 1971).

23. Having found a pattern of discriminatory exclusion in hiring and assignments, this Court has wide discretion in ordering such affirmative action, including the accelerated hiring and assignment of blacks in an effort to meet goals established for the purpose of overcoming the past patterns of racial exclusion. *United States* v. *Local 212 International Brotherhood of Electrical Workers*, 473 F. 2d 634 (6th Cir. 1973); *Southern Illinois Builders Association v. Ogilvie*, 471 F. 2d 680 (7th Cir. 1972).

24. Where tests have been found to have a discriminatory impact and to be without proper validation and justification for the level of their cut-off scores or standards, their continued use must be prohibited. *Moody* v. *Albemarle Paper Co., supra.* Such a prohibition may allow resumption of testing as a selection device when the following conditions are met. The test must be properly demonstrated to be valid predictors of job performance. Differential validity must also be accomplished where this is feasible, as it is here in the case of the mechanical and clerical placement batteries and the assistant power plant operators' battery because sufficient numbers of blacks are found

in these occupations. Where differential validity is not technically feasible, but the lack of sufficient numbers of black employees for this purpose is due to the Company's unlawful practices, reasonable steps, including the lowering of cut-off scores, must be taken to permit sufficient numbers of blacks to gain access to the occupation group so that differential validity may be established. This requirement applies as well to such cases as that of the customer servicemen's battery where validity for a general population group has been established. Where cut-off scores are unreasonably high they should be adjusted so that they screen out only those who may reasonably be expected to be unsatisfactory employees in relation to the proficiency required to perform the job and not measured merely in comparison to other employees. *Griggs* v. *Duke Power Co., Supra; United States v. Jacksonville Terminal Co., supra; United States* v. *Georgia Power Co., supra; Moody* v. *Albemarle Paper Co., supra.*

25. Where, because of discrimination, black employees and rejected applicants have lost employment opportunities which would have allowed them to earn more than they have earned, it is appropriate to award them amounts of back pay sufficient to restore them to the economic position in which they would have been but for this discrimination. *Robinson* v. *Lorillard, supra.* It is also appropriate for such an award to be made in pattern and practice suits brought by the Attorney General and involving classes of victims of discrimination, *United States v. Georgia Power Co., supra,* and for the actual amounts to be awarded to individual recipients to be determined by an ancillary proceeding. *Bowe* v. *Colgate-Palmolive, supra.*

26. The Court may allow private plaintiffs reasonable attorneys' fees as part of costs. 42 U.S.C. 2000e-5(k).

27. The Court may assess punitive damages. Cf. 42 U.S.C. 1983; *Lee* v. *Southern Home Sites Corp.*, 429 F. 2d 290 (C.A. 5, 1970); *Chubbs* v. *City of New York*, 324 F. Supp. 1183 (D.C.S.D. N.Y., 1971).

ORDER

Private plaintiffs are authorized under the Civil Rights Act of 1964 to bring an action on behalf of themselves and all other persons similarly situated pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The United States is also a proper party plaintiff. The members of the class represented by the plaintiffs are all black citizens whom defendant Detroit Edison Company has refused to hire and has discharged from employment, discriminated against with respect to compensation, terms conditions and/or terms of employment; and/or otherwise segregated, classified, or otherwise deprived them of employment opportunities because of their race or color.

Defendants Detroit Edison Company, Local 223, Utility Workers Union of America and Local 17, International Brotherhood of Electrical Workers of America, have, prior and subsequent to July 2, 1965, discriminated against blacks, including plaintiffs and members of their class with respect to employment, compensation, terms and conditions of employment due to race, and/or color through the utilization of hiring practices, tests, standards and procedures which deny plaintiffs their statutory rights under all statutes noted above. As a result of the aforementioned discriminatory practices, defendant Detroit Edison Company is under an affirmative obligation to employ and promote substantial numbers of black workers. Defendants Local 223 and Local 17 are under an obligation to represent their

black members, black applicants and black employees in and outside their bargaining units fairly.

Therefore, It Is Hereby Ordered, Adjudged and Decreed, as follows:

1. The defendants and their officers, agents, employees, successors, and interests, and all persons in active concert with participation with them are permanently enjoined from engaging in any act or practice which has the purpose or effect of discriminating against any individual because of his race or color, and specifically from (a) refusing to hire or failing to hire, promote, upgrade, train or assign any individual discharging any individual, otherwise discriminating against any individual as an employee or applicant for employment with respect to his compensation, terms, conditions or privileges of employment because of such individual's race or color; (b) limiting, segregating or classifying the employees of the Company in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race or color and (c) discriminating or retaliating in any manner against any employee or applicant who has furnished information or participate in any respect in the investigation of the Company's employment practices in connection with these actions.

2. The affected class for the purposes of the hiring and transfer provisions of this decree shall be deemed to consist of all black individuals who applied for employment with defendant Detroit Edison Company subsequent to July 2, 1965, and were rejected and black employees who would have applied but for defendant's discriminatory hiring policy and/or black employees who were hired prior to the date of the decree and who were actively employed

at any time after July 2, 1965, and who were at any time regular employees in the job classifications referred to above as low opportunity jobs.

3. All members of the affected class who were refused hire or who would have been refused hire at Detroit Edison Company between July 2, 1965, and the date of the decree shall be put on notice through newspaper and radio advertisements in the black media (which shall include but not be limited to the *Michigan Chronicle* and 1 black radio station and 1 black television station), the *Detroit News* and/or the *Detroit Free Press* regarding the content of this decree. Such notices shall run for at least 60 days. Within 60 days after the last day of such notice all black individuals who (1) have been rejected on the basis of race, and (2) attended a vocational school in the Detroit area and took courses in mathematics, science or similar courses and who would have applied to Edison but for defendant's discriminatory hiring policy, shall sign a register at the Company's employment offices or at another appropriate location. Such individuals shall receive notice of and receive first opportunity to apply for vacancies in high opportunity jobs designated in this decree for the duration of this decree. Applications shall be considered in the chronological order in which the applicant has signed the register. Such individuals shall also be part of the affected class for the purposes of the back pay provisions set forth below as well as those provisions relating to notification of vacancies, bidding and seniority credits. Such individuals' seniority which is to be utilized for the purpose of the transfer provisions of this decree shall be computed from the date that the applicant was rejected because of race or the date that such individuals identified above in category 2 would have applied for but defendant's discriminatory hiring policy.

4. All members of the affected class shall have an opportunity to transfer to jobs in departments other than those to which they are presently assigned by bidding on such jobs when vacancies occur and are posted for bid.

At each location and in each department where a member of the affected class is employed, the Company shall post vacancies for all jobs in all departments at least 20 days before such vacancies are to be filled. The Company shall also establish a procedure by which it shall receive bids for posted jobs in writing. No affected class member shall be required to hold a labor or helper job which does not provide training for craft jobs in a line of progression as a condition of progress into such a line of progression.

A member of the affected class may effectuate a single transfer with carry-over seniority rights and earnings retention to a new department within five years after the effective date of this decree unless the period is extended by the court. In the event that an affected class member who transfers chooses to return to his former department, or fails to perform the duties of his new department, within 90 days after his transfer, he may return to his former department without loss of seniority or benefits. Such an affected class member who returns to his former department as a result of disqualification may effectuate two additional transfers to new departments without loss of carryover seniority and rate retention as if it were his first transfer under the terms of this decree. In the event that an applicant fails to perform his duties, such applicant shall be given the opportunity to transfer to another job with the same future transfer rights provided employees in this decree. In such an event, the Company shall file with the Court a report within 15 days after the employee's disqualification, setting forth the training opportunities

afforded the employee and the reasons for his disqualification in specific factual terms.

5. All members of the affected class shall be credited with their Company seniority as if it were that department or unit seniority in the department or unit to which they transfer pursuant to this decree or in departments or units to which they previously transferred.

6. At no time shall a member of the affected class who is transferred under this decree be paid a lower rate than the rate for the job for which he transferred.

7. Defendants shall pay each of the members of the affected class an amount equal to the average earnings of skilled trades high opportunity jobs referred to above since July 2, 1965, less the amount each member of the affected class actually earned during that period up to the date of this decree. From the date of this decree defendants shall pay each member of the affected class an amount equal to the average present earnings of said high opportunity skilled trades jobs until the time at which the employee effectuates a transfer to a high opportunity job consistent with the provisions noted above. The amount of pay provided subsequent to the decree shall not be lower than the affected class member's earnings and the amount that he should make in the future according to his pay progression that he is under at the time of the decree. Such amount of pay at the skilled trades pay rate shall be computed for pay grade progression purposes according to the number of years that a member of the affected class has been employed in a low opportunity job or in the case of the rejected applicant excluded from employment altogether from that date of his rejection provided, however, that in the case of the rejected applicant his time shall be computed subsequent to July 2, 1965.

8. Subsequent to the time of the transfer to a high opportunity job, said member of the affected class shall receive a rate of pay for the job to which he has successfully bid or the rate of pay previously received whichever is the higher and shall receive future increases in said classification as if he had been in the classification from the date of the decree. If such a member of the affected class refuses 3 transfer opportunities to high opportunity jobs or is unable to perform his duties on 2 jobs after 2 transfers, he shall revert to his former rate of pay, i.e., the pay progression rate that he was on and would be on in the absence of this decree.

9. Subject to the availability of qualified applicants, the Company shall recruit and endeavor to hire black applicants for all positions within the Company on an accelerated basis with the goal of having a number of blacks employed by the Company at 30% of its total work force.[3]

10. In order to insure that the Company's policy of non-discriminatory hiring is communicated to minority groups, the Company shall establish contacts with high schools, technical and vocational schools and organizations which specialize in minority employment in the Detroit area and inform them of the employment opportunities available at Detroit Edison and of the Company's non-discriminatory hiring policy. In addition, whenever the number of black applicants among all applicants being con-

[3] Taking into consideration the percentage of blacks in the City of Detroit (44 percent) and the percentage of blacks available in the labor force of the City of Detroit (41.3 percent) and the Standard Metropolitan Statistical Area (17 percent) and the proportion of blacks among the skilled unemployed in the City of Detroit (47 percent) and the concentration of Edison's work force in the City of Detroit (50%), a goal of 30 percent black employment at Edison is reasonable.

sidered for employment is less than 50%, the Company shall advertise opportunities in mass media which are directed primarily to the black community.

11. Subject to the availability of applicants, the Company shall be recruiting and hiring black applicants or by the promoting and transferring of black employees fill all future vacancies which are filled from outside the Company or inside the Company in the jobs listed below on the basis of three blacks for every two whites until 25% of the employees in each of these jobs and lines of progession are black:

Production Department

power plant operator	general mechanic
fireman	industrial operator
equipment operator	instrument man

Construction Department

brickmason	bridgeman
sheetmetal worker	painter
shop electrician	welder
shop machinist	rigger
mechanic fitter	carpenter
electrician	pipecoverer

Transmission and Distribution

lineman	cable splicer

Marketing Department

appliance repairman	customer serviceman

Meter Department

meter tester

Electrical Systems-Substation

operator	journeyman electrical maintenance

Transportation Department

auto mechanic

Meter Reading

meter reader

12. The Company shall promote from amongst its senior black employees one black employee as foreman or supervisor for every one white employee who is promoted to supervisor.

13. The Company shall not administer for the purposes of hiring and promotion or transfer any general intelligence or aptitude test for black employees or applicants that is not validated in accordance with the EEOC's Guidelines on Employee Selection Procedures 29 C.R.R. §§ 1607.1 to 1607.14.

14. Defendants shall provide immediate promotion to a job which has a pay rate equivalent and responsibilities equivalent to a supervisory position to Mr. James Atkinson.

15. Defendant Local 223 Utility Workers of America shall refrain from retaliating against plaintiff Willie Stamps for his efforts to obtain equal rights for black workers and applicants and shall refrain from interfering in any way with the full enjoyment of his rights as Chair-

man of the Property and Right of Way Division in Local 223 Utility Workers Union of America. Defendant Local 223 shall affirmatively take steps to assure that Stamps serves his full term as Chairman as he was elected to do in December 1972.

16. A committee will be established which will report to the Court on a bi-monthly basis for the duration of this decree which shall be six years. The committee shall be composed of representatives of defendants, the Association for the Betterment of Black Edison Employees and the Justice Department and a chairman to be appointed by the court. The chairman shall be the Director of the Detroit office of Equal Employment Opportunity Commission. If the Director of the Detroit office of the Equal Employment Opportunity Commission is unwilling or unable to serve, the Court shall appoint another chairman. The purpose of said committee will be to resolve differences and disputes that may arise under this decree. Whenever any issue arises that cannot be resolved by this committee, any party shall have the right immediately to refer said issue to the Court or the Court's designate for disposition.

17. Within thirty days after April 1 and October 1 of each year for the six years following the entry of this decree, the Company shall report to the Court and plaintiffs the following information:

A. A printout showing all employees grouped by department and by job code within each department indicated for each employee; name, race, department, job pay rate and hire date and a summary showing the total number of employees by race in each department and in each job classification within each department. The Company shall retain all job posting notices and bidding

records for a period of at least two years and shall provide a record of all posting, on which members of the affected class have bid including the date of the posting, the job posted, the employees who bid, the successful bidder and the date the job was awarded.

B. A list of all schools and organizations contacted by the Company in recruiting minority applicants, the nature of the contract and the number of applicants referred by each.

C. A breakdown of the Company's applicant flow by race which indicates the number of applicants hired, pending and rejected. For all active pending minority applicants, such breakdown shall indicate the number of minority applicants who are to be considered for each job classification.

D. A breakdown of all new hires indicating name, race and job classification.

E. The number of employees by race currently employed in the craft jobs described above, indicating the number employed as apprentices or helpers and as journeyman.

F. The defendants shall make all records and documents relevant to the provisions of this decree available to private plaintiffs, the Department of Justice, and the Association for the Betterment of Black Edison Employees, for copying at defendant's offices in Detroit, Michigan.

18. Defendants shall pay to private plaintiffs reasonable attorneys' fees.

19. Defendants Detroit Edison Company and Local 223 shall pay plaintiffs punitive damages. Since those defendants have been extremely obdurate and intransigent in their determination to implement and perpetuate racial discrimination in employment at Detroit, Edison, the awarding of punitive damages is appropriate and necessary. The trial record indicates that these two defendants repeatedly and callously disregarded or rejected the numerous appeals of blacks who asked that Edison's hiring and promotion practices be reformed and that blacks be afforded fair representation by the unions. It is both commendable and remarkable that black workers at Detroit Edison so long persisted in seeking justice by means of persua—in the face of the defendants' unwillingness to respond to reasonable expressions of concern by black workers—before resorting to this law suit. When a defendant's behavior is so extremely unreasonable and violative of the law as has been the behavior of two of the defendants in this case, one can only infer that the defendants have acted with malice. Therefore, this Court hereby orders defendant Detroit Edison Company to forthwith pay plaintiffs, including both those individually named as plaintiffs and those comprising the class represented by the named plaintiffs but excluding the United States, Four Million Dollars ($4,000,000.00). This Court hereby orders defendant Local 223 to forthwith pay plaintiffs, including both those individually named as plaintiffs and those comprising the class represented by the named plaintiffs but excluding the United States, Two Hundred Fifty Thousand Dollars ($250,000.00). The Court finds that although Local 17 has engaged in racial discrimination against blacks at Detroit Edison in its collective bargaining agreement, it has not acted with the requisite malice of the Company or Local 223; this Court will therefore not award punitive damages

against Local 17. The punitive damages awarded in this case shall be paid to the Clerk of the U. S. District Court, and this Court shall issue a subsequent Order providing for the manner in which the money is to be disbursed to plaintiffs.

This Court will maintain jurisdiction for the purpose of ordering such additional relief as seems appropriate and necessary.

It Is So Ordered.

/s/ Damon J. Keith
U. S. District Judge

Dated: October 2, 1973.

Supreme Court, U. S.
FILED
JAN 6 1976
MICHAEL RODAK, JR., CLERK

Nos. 75-220, 75-221, 75-239, 75-393

In the Supreme Court of the United States

OCTOBER TERM, 1975

LOCAL 223, UTILITY WORKERS UNION OF AMERICA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

LOCAL 17, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

WILLIE STAMPS, ET AL., PETITIONERS

v.

DETROIT EDISON COMPANY, ET AL.

DETROIT EDISON COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statement	3
Argument	9
Conclusion	25

CITATIONS

Cases:	
Board of Education v. *Swann*, 402 U.S. 43	9
Boston Chapter, NAACP, Inc. v. *Beecher*, 504 F. 2d 1017, certiorari denied, 421 U.S. 910	10, 11
Bowe v. *Colgate, Palmolive Co.*, 489 F. 2d 896	17
Carter v. *Gallagher*, 452 F. 2d 315, certiorari denied, 406 U.S 950	10
Chance v. *Board of Examiners*, 458 F. 2d 1167	15
Comstock v. *Group of Institutional Investors*, 335 U.S. 211	16
Contractors Ass'n of Eastern Pennsylvania v. *Secretary of Labor*, 442 F. 2d 159, certiorari denied, 404 U.S. 854	10
Franks v. *Bowman Transportation Co.*, 495 F. 2d 398, certiorari granted, 420 U.S. 989	19
Griggs v. *Duke Power Co.*, 401 U.S. 424	16
Hairston v. *McLean Trucking Co.*, 520 F. 2d 226	24

211-691—75——1

Cases—Continued

	Page
Jersey Central Power & Light Co. v. *IBEW Locals,* 508 F. 2d 687 petition for a writ of certiorari pending, No. 75–182	20
Jones v. *Lee Way Motor Freight, Inc.,* 431 F. 2d 245, certiorari denied, 401 U.S. 954	17, 19
Kirkland v. *New York State Dept. of Correctional Services,* 520 F. 2d 420	10
Local 189, United Papermakers and Paperworkers v. *United States,* 416 F. 2d 980, certiorari denied, 397 U.S. 919	17, 18
Louisiana v. *United States,* 380 U.S. 145	10
Meadows v. *Ford Motor Co.,* 510 F. 2d 939	19
Mitchell v. *DeMario Jewelry, Inc.,* 361 U.S. 288	21
NAACP v. *Allen,* 493 F. 2d 614	10
Northeast Construction Co. v. *Romney,* 485 F. 2d 752	10
Porter v. *Warner Holding Co.,* 328 U.S. 395	21
Quarles v. *Philip Morris, Inc.,* 279 F. Supp. 505	17, 18
Rias v. *Steamfitters Local 638,* 501, F. 2d 622	10
Sabala v. *Western Gillette, Inc.,* 516 F. 2d 1251	24
Southern Illinois Builders Ass'n v. *Ogilvie,* 471 F. 2d 680	10
United States v. *Bethlehem Steel Corp.,* 446 F. 2d 652	17, 20
United States v. *Chesapeake and Ohio Ry. Co.,* 471 F. 2d 582, certiorari denied, 411 U.S. 939	17
United States v. *Georgia Power Co.,* 474 F. 2d 906	20, 21

Cases—Continued

	Page
United States v. *IBEW Local 38,* 428 F. 2d 144, certiorari denied, 400 U.S. 943	10, 11
United States v. *Ironworkers Local 86,* 443 F. 2d 544, certiorari denied, 404 U.S. 984	10
United States v. *Masony Contractors Ass'n of Memphis, Inc.,* 497 F. 2d 871	20
United States v. *N.L. Industries, Inc.,* 479 F. 2d 354	20–21
United States v. *St. Louis-San Francisco Ry. Co.,* 464 F. 2d 301, certiorari denied, 409 U.S. 1116	17
United States v. *United Ass'n of Journeymen,* 364 F. Supp. 808	21
United States v. *Wood, Wire and Metal Lathers, Local 46,* 328 F. Supp. 429, affirmed, 471 F. 2d 408, certiorari denied, 412 U.S. 939	11, 20
Waters v. *Wisconsin Steel Works,* 502 F. 2d 1309	19, 20
Watkins v. *United Steel Workers,* 516 F. 2d 41	20
Statutes:	
Civil Rights Act of 1866, Sec. 1, 42 U.S.C. 1971	4
Civil Rights Act of 1964, Title VII, 78 Stat. 253, 42 U.S.C. 2000e, *et seq.,* and as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. (Supp. III) 2000e, *et seq.*:	
Sec. 703(j), 42 U.S.C. 2000e–2(j)	10, 14
Sec. 703(h), 42 U.S.C. 2000e–2(h)	16, 18

	Page
Statutes—Continued	
Sec. 706, 42 U.S.C. (Supp. III) 2000e–5	21
Sec. 706(a), 42 U.S.C. 2000e–5(a)	4
Sec. 706(g), 42 U.S.C. (Supp. III) 2000e–5(g)	18
Sec. 707, 42 U.S.C. 2000e–6	3
Sec. 707, 42 U.S.C. (Supp. III) 2000e–6	4, 20, 21
Sec. 707(c), 42 U.S.C. (Supp. III) 2000e–6(c)	4
Sec. 707(d), 42 U.S.C. (Supp. III) 2000e–6(d)	4
Labor-Management Relations Act, 61 Stat. 136, 29 U.S.C. 141, *et seq.*:	
Sec. 1, 29 U.S.C. 151	4
Sec. 301, 29 U.S.C. 185	4
Miscellaneous:	
110 Cong. Rec. (1964):	
Pp. 7206–7207, 7212–7215	17
Pp. 12595, 12722, 14220	21
"Four Agency Agreement", CCH Employment Practices, ¶3775 (1973)	11

In the Supreme Court of the United States

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No. 75–220

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BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 77a–103a, 104a–106a)[1] is reported at 515 F. 2d 301. The opinion and order of the district court (Pet. App. 4a–76a) are reported at 365 F. Supp. 87.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1975. Rehearing was denied and the court modified its earlier judgment by order entered May 16, 1975 (Pet. App. 104a–106a). The petitions for a writ of certiorari were filed on the following dates: No. 75-220 on August 11, 1975; No. 75–221 on August 13, 1975; No. 75–239 on August 14, 1975; No. 75–393 on September 12, 1975 (pursuant to an order issued by Mr. Justice White extending the time for filing until September 15, 1975). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1.(a) Whether a district court, upon a finding that an employer engaged in racially discriminatory hiring and promotion practices, may properly fashion a remedy that provides for race-conscious hiring and promotion of qualified persons.

(b) Whether the district court's order in this case, insofar as it provided for such race-conscious hiring and promotion, was consistent with applicable statutory and constitutional proscriptions of racial discrimination.

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 75–393.

2.(a) Whether the court of appeals correctly sustained the district court's finding that the existing departmental seniority system at issue in this case perpetuates the effects of past discrimination in hiring and assignment.

(b) Whether, on the basis of that finding, the district court properly ordered that employees who are members of the affected class be allowed to bid for jobs on the basis of their companywide, rather than departmental, seniority.

3.(a) Whether, upon a finding of unlawful employment discrimination in a suit brought by the government pursuant to Section 707 of the Civil Rights Act of 1964, a district court may properly award back pay to the identified victims of that discrimination.

(b) Whether the court of appeals correctly defined the class of individuals who were eligible to be considered for back pay awards.

(c) Whether the court of appeals adopted a proper test for determining individual entitlement to back pay.

4. Whether the court of appeals correctly upheld the district court's finding that Local 223, Utility Workers Union of America, engaged in unlawful employment practices.

STATEMENT

This is a consolidation of two actions alleging racial discrimination in employment practices against Detroit Edison Company, a public utility, and two union locals which are the collective bargaining rep-

resentatives of some Detroit Edison employees—Local 223, Utility Workers Union of America,[2] and Local 17, International Brotherhood of Electrical Workers (Pet. App. 78a).[3] Three black employees of Detroit Edison brought a class action in May 1971 claiming violations of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. 2000e, *et seq.*, Section 1 of the Civil Rights Act of 1866, 42 U.S.C. 1981, and Sections 1 and 301 of the Labor-Management Relations Act, 61 Stat. 136, 156, 29 U.S.C. 151, 185.[4] In June 1972, the United States brought suit under Section 707 of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. III) 2000e–6, alleging a pattern and practice of violation of the rights protected by Title VII.[5]

After a lengthy trial, the district court found, on the basis of "overwhelming" evidence, that "invidious racial discrimination in employment practices permeates the corporate entity" of Detroit Edison (Pet. App. 13a) and that such discrimination "has been deliberate and by design" (*id.* at 14a). The court found that the company had discriminated in hiring,

[2] Local 223 represents approximately 4,000 employees in various job classifications, grouped in approximately 28 bargaining units (Pet. App. 18a).

[3] Local 17 represents approximately 800 employees, almost all of whom are in a single bargaining unit (Pet. App. 18a; Local 17 Pet. 4).

[4] The class action was instituted pursuant to Section 706(a) of Title VII after the filing of a charge with the Equal Employment Opportunity Commission in January 1971 by petitioner Stamps (Pet. App. 99a).

[5] After judgment, the Equal Employment Opportunity Commission was substituted as plaintiff in the government action, pursuant to Section 707(c) and (d).

placement, and promotion practices (*id.* at 56a–62a). By use of various discriminatory means (*id.* at 20a–21a, 29a–37a), the court found, the company had hired, as of April 1972, only 832 blacks out of a work force of 10,630 (*id.* at 24a). Of the approximately 1,100 supervisory positions, only 12 were held by blacks (*ibid.*)

The district court found that blue collar jobs at Detroit Edison could be classified as high opportunity or low opportunity, with high opportunity jobs characterized by higher wage rates and better working conditions (*id.* at 23a–24a).[6]

With respect to discrimination in placement and promotion, the court found that, through various means (*id.* at 29a–30a, 31a–37a, 40a), blacks were denied high opportunity jobs. Although the company claimed to follow a practice of hiring untrained and inexperienced employees and training them for better jobs (*id.* at 45a–46a), "[h]igh opportunity jobs have been and remain nearly all white" (*id.* at 24a). In many cases, the court found, blacks with "work experience and education superior to that of white employees" in high opportunity jobs "were assigned to and refused transfer from low-opportunity jobs" (*id.* at 21a).[7] Moreover, blacks were generally ex-

[6] Low opportunity jobs include janitor, porter, elevator operator, and plant cleaner (Pet. App. 19a). The highest wage rate for low opportunity jobs is $4.32 per hour, while that is the starting rate for some high opportunity jobs (*id.* at 23a–24a).

[7] The company offered no evidence that whites assigned to high opportunity jobs were better qualified than blacks placed in low opportunity jobs (Pet. App. 45a).

cluded from any jobs in departments or smaller units within a department that had high opportunity jobs (*id.* at 19a, 23a–28a).

The company's work force is divided into departments, which are further divided into bargaining units and, finally, into occupational groups. Collective bargaining agreements with the defendant unions, and company policy with respect to some employees not within a bargaining unit, provide for a system of job posting that gives preference in bidding on vacancies within a department or smaller unit to workers in that department or unit (*id.* at 58a).[8] The district court found that this system largely denies to blacks, who were not initially assigned to departments with high opportunity jobs, the opportunity to bid on such jobs (*id.* at 39a).

The seniority system, provided for in collective bargaining agreements and by company policy (*id.* at 58a), further limits the access of blacks to high opportunity jobs. Seniority for purposes of promotion, transfer, and other employment decisions is based on length of service in an employee's occupa-

[8] The collective bargaining agreement negotiated by Local 17 provides for posting of vacancies within the department in which they occur. Only if a vacancy is not filled from within the department is it posted companywide. Preference is given to those within the bargaining unit in which the vacancy occurs (Pet. App. 37a–38a). The agreement with Local 223 provides for posting of vacancies within an occupational group. If a vacancy is not filled within the group, it is posted within the bargaining unit, and then within the department. If it is still unfilled, it is posted companywide (*id.* at 39a). An employee cannot bid on a job not posted in his group, unit, or department.

tional group or department (*id.* at 37a, 39a).[9] Promotions within an occupational group, bargaining unit, or department are, as a general rule,[10] awarded to the bidding employee with the most seniority within that group, unit, or department who possesses the required "skills, abilities and/or adaptability" (*id.* at 37a–39a). If an employee bids successfully on a vacancy in another department, he cannot carry with him any of the seniority he has previously acquired, and he must accept a wage rate that may be less than his current rate (*id.* at 38a, 39a).

The district court found that the seniority system discourages transfers of blacks to departments with high opportunity jobs and denies them the same advancement opportunities enjoyed by whites with equal company seniority (*id.* at 38a, 39a–40a), thus "locking" blacks into low opportunity jobs and restricting their advancement (*id.* at 53a). The court concluded that discrimination in placement was perpetuated by the systems of job posting and seniority (*ibid.*).

The district court also found that, by acquiescing in Edison's discriminatory practices and by knowingly entering into collective bargaining agreements

[9] A system of departmental seniority credits time worked in a department or smaller unit, in contrast with a system of employment or company seniority, which credits total time employed by the company in any department.

[10] There is one exception. When there is a vacancy in a job covered by the collective bargaining agreement with Local 223, which is posted outside the bargaining unit, the measure of seniority is company seniority (Pet. App. 39a).

that perpetuated the effects of those practices, the unions had failed to represent the interests of their black members (*id.* at 39a–40a, 41a, 55a). Moreover, Local 223 was found to have engaged in affirmative acts of discrimination (*id.* at 40a–41a, 55a).

The district court concluded that all three defendants had engaged in unlawful employment practices (*id.* at 56a–57a, 58a, 59a). The court enjoined the discriminatory practices (*id.* at 66a–67a) and ordered affirmative relief for the "affected class" (*id.* at 67a), including back pay (*id.* at 69a–70a) and provision for transfer to departments and units that have high opportunity jobs, with retention of seniority and wage rate (*id.* at 68a–69a). The relief incorporated race-conscious numerical goals for hiring, for promotion to supervisory positions, and for placement in high opportunity lines of progression (*id.* at 70a–72a). The district court also awarded punitive damages against Edison and Local 223 and attorneys fees against all three defendants (*id.* at 74a, 75a). A committee was established to aid in the resolution of issues respecting the decree, and the court retained jurisdiction to resolve such issues (*id.* at 73a) and to grant additional necessary and appropriate relief (*id.* at 76a).

The court of appeals held that the district court's findings were supported by the evidence, and it affirmed the district court's conclusions of law respecting unlawful discrimination by the three defendants (Pet. App. 92a–95a). The award of punitive damages was reversed (*id.* at 83a–86a). The court of appeals upheld the affirmative relief with some modifications, and it remanded for further proceedings (*id.* at 103a).

ARGUMENT

1. The district court established goals for the hiring of qualified blacks and for the advancement of qualified blacks into high opportunity jobs and supervisory positions. Edison was ordered to "recruit and endeavor to hire black applicants for all positions within the Company on an accelerated basis with the goal of having a number of blacks employed by the Company at 30% of its total work force" (Pet. App. 70a). A goal of 25 percent blacks was established for specified high opportunity jobs and lines of progression, with future vacancies to be filled on the basis of three blacks for every two whites (*id.* at 71a). The court ordered that supervisory vacancies be filled on the basis of one senior black employee for every white (*id.* at 72a). The court of appeals remanded for the setting of a percentage goal or time limitation which, when reached, would terminate the obligation of ratio promotion of supervisors (*id.* at 102a).

Petitioners condemn the hiring and promotion goals sustained by the court of appeals as racial classifications, arguing that such racially-conscious relief is constitutionally barred (Edison Pet. 9–11; Local 17 Pet. 10). Race-consciousness, however, is not prohibited. Courts faced with proof of racial discrimination are not required to be "color blind," but may properly employ numerical racial standards as "starting points" in effecting relief from such discrimination. *Board of Education* v. *Swann*, 402 U.S. 43, 45–46. In cases of proven employment discrimination, a race-conscious numerical goal provides both a means of assuring that relief will be effective, by shifting

to the employer the burden of taking affirmative steps to remedy unlawful practices, and an objective standard for measuring progress toward that end. See *NAACP* v. *Allen*, 493 F.2d 614 (C.A. 5). Relief of this sort has been upheld by nine courts of appeals.[11]

Contrary to petitioner Detroit Edison's assertions (Pet. 10–12), the goals in this case were not established merely to assure blacks proportional representation in employment. Rather, in the face of strong proof of racial discrimination, the courts below chose to establish goals as a means of eliminating the effects of past discrimination, as well as preventing future unlawful activities. See *Louisiana* v. *United States*, 380 U.S. 145, 154. Section 703(j), designed to prevent preferential treatment for blacks on the basis of racial

[11] See, *e.g.*, *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017 (C.A. 1), certiorari denied, 421 U.S. 910; *Rios* v. *Steamfitters Local 638*, 501 F.2d 622 (C.A. 2); *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (C.A. 3), certiorari denied, 404 U.S. 854; *NAACP* v. *Allen*, *supra*; *United States* v. *IBEW Local 38*, 428 F.2d 144 (C.A. 6), certiorari denied, 400 U.S. 943; *Southern Illinois Builders Ass'n* v. *Ogilvie*, 471 F.2d 680 (C.A. 7); *Carter* v. *Gallagher*, 452 F.2d 315 (C.A. 8) (*en banc*), certiorari denied, 406 U.S. 950; *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (C.A. 9), certiorari denied, 404 U.S. 984; *Northeast Construction Co.* v. *Romney*, 485 F.2d 752 (C.A.D.C.).

Kirkland v. *New York State Dept. of Correctional Services*, 520 F.2d 420 (C.A. 2), relied upon by petitioner Detroit Edison (Pet. 11), is not inconsistent with this line of cases. In *Kirkland*, the court of appeals declined to impose numerical relief because of insufficient proof of widespread discrimination in the past (520 F.2d at 428). Other cases decided by that court were distinguished on the ground that in those cases, as here, there was a "clear-cut pattern of long-continued and egregious racial discrimination" and no evidence of reverse discrimination (*id.* at 427).

imbalance alone, does not prohibit a court from establishing race-conscious goals. *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 504 F.2d at 1028; *United States* v. *Wood, Wire and Metal Lathers, Local 46*, 471 F.2d 408, 413 (C.A. 2), certiorari denied, 412 U.S. 939; *Southern Illinois Builders Ass'n* v. *Ogilvie*, *supra*, 471 F.2d at 684–686; *United States* v. *IBEW Local 38*, *supra*, 428 F.2d at 149.

2. Although some form of numerical relief may thus properly be ordered in a case like this one, the provisions of the particular decree in this case may be potentially troublesome depending upon the manner in which the district court resolves on remand certain ambiguities in the decree. The existence of those ambiguities, to which we will advert shortly, makes this an inappropriate stage of the litigation to consider the statutory and constitutional limitations on race-conscious hiring and promotion relief to remedy proven employment discrimination.

The general policy of the federal government with respect to race-conscious hiring and promotion remedies is expressed in a March 23, 1973, memorandum (commonly known as the "Four Agency Agreement") which is reproduced at CCH Employment Practices, ¶3775. The memorandum represents a statement of policy developed jointly by the Equal Employment Opportunity Commission, the Department of Justice, the Civil Service Commission, and the Department of Labor's Office of Federal Contract Compliance, as a uniform guide for use by each agency concerning equal employment opportunity matters in state and local government personnel systems. The principles

reflected in the memorandum are equally applicable to analogous situations in the private sector.

The memorandum states that identifiable individual victims of employment discrimination should be given priority consideration for new vacancies to restore them to the positions they would have been in but for the discrimination (*id.*, p. 2063–4). Moreover, "it may be appropriate for a court to order an employer to make a good faith, nondiscriminatory effort to meet goals and timetables where a pattern of discriminatory employment practices has been found" (*ibid.*). The memorandum distinguishes between "permissible goals on the one hand and impermissible quotas on the other" (*ibid.*). A quota requires the hiring or promotion of a fixed number or percentage of a designated class "regardless of the number of potential applicants who meet necessary qualifications"; it thus "requires that considerations of relative abilities and qualifications be subordinated to considerations of race, religion, sex or national origin in determining who is to be hired, promoted, etc." (*ibid.*).

"A goal, on the other hand, is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job market" (*ibid.*). An employer would not be subject to sanction for failure to meet a goal, if, for example, he has fewer vacancies than expected or if, despite his good faith efforts, he has not been able to include in the group of persons considered for selection a sufficient number of persons from the group previously discriminated against (*ibid.*). Nor would he be required to

hire or promote an unqualified person in preference to a qualified person, or a less qualified person in preference to a better qualified person, "provided that the qualifications used to make such relative judgments realistically measure the person's ability to do the job in question, or other jobs to which he is likely to progress" (*ibid.*). But, "where there has been a history of unlawful discrimination, if goals are set on the basis of expected vacancies and anticipated availability of skills in the market place, an employer should be expected to meet the goals if there is an adequate pool of qualified applicants from the discriminated against group from which to make selections; and if the employer does not meet the goal, he has the obligation to justify his failure" (*id.*, p. 2063–5).

The district court's decree, as modified by the court of appeals, contains several ambiguities that make it difficult to determine whether its provisions are entirely consistent with these principles. Apart from provisions properly designed to compensate the identifiable individual victims of the prior employment discrimination (Pet. App. 65a–70a), the order establishes a general goal of increasing the number of black employees to 30 percent of the total work force "[s]ubject to the availability of qualified applicants" (*id.* at 70a). The court of appeals imposed a similar condition on the provision requiring that promotions to foreman be made on the basis of one black for each white employee promoted (*id.* at 72a, 102a). The provision requiring that hiring for and promotion in high opportunity jobs be on the basis of three blacks for every

two whites until 25 percent of the employees in those jobs are black is not explicitly conditioned on the availability of qualified persons (see *id.* at 71a). Although we assume that it will be so construed by the district court, the effect of the provision is unclear at the present stage. It is also unclear whether the order will permit the hiring of better qualified persons regardless of race or whether the goals will nonetheless have to be met if there is a sufficient number of minimally qualified black applicants.[12]

The provision establishing hiring and promotion goals for high opportunity jobs and lines of progression (*ibid.*) does not indicate what weight company seniority may be given in selecting persons for promotion. If the order were construed to require compliance with the three-for-two promotion requirement without regard to relative seniority of white and black employees, it might exceed the bounds of "rightful place" relief by preferring blacks over whites for promotion solely on the basis of their race. See Section 703(j) of the Act, 42 U.S.C. 2000e–2(j).[13]

The validity of the decree as a proper remedy for proven racial discrimination in employment practices cannot, in our view, adequately be determined in its present abstract form. It may be read in a way that

[12] The difference would be significant only if the basis for distinguishing better from lesser qualified persons realistically reflects ability to do the job (see p. 13, *supra*).

[13] The same ambiguity is present in the provision requiring one-for-one promotion to foreman or supervisor (Pet. App. 72a). That provision, moreover, contains no limitation in terms of time or percentage, and the court of appeals directed the district court to fix such a limitation on remand (Pet. App. 102a).

appears consistent with what we view as the applicable statutory and constitutional principles, but it may also be read in a way that would make it inconsistent with those principles. Although the propriety of race-conscious hiring and promotion remedies for employment discrimination may well warrant consideration by this Court, that consideration, we believe, should await a case in which the full contours of the remedial order have been spelled out unambiguously in the terms of the decree or have been fleshed out by the district court by application to concrete situations. The present order, at this stage of the litigation, meets neither standard.[14]

The district court has established a procedure for clarifying the ambiguities inherent in its order and has retained jurisdiction for that purpose (Pet. App. 73a, 76a). In light of the unanswered questions regarding implementation of that order and the district court's intention to deal with those questions, further review at this time would be premature.

3. The district court found that the seniority system, although neutral on its face, operated to "perpetuate the effects of past discrimination in assignment" (Pet. App. 58a). Local 223 contends that that finding, upheld by the court of appeals, is clearly erroneous (Local 223 Pet. 7). Further review of this

[14] Petitioners challenge the particular percentage figures established by the district court as goals and the ratios adopted by the court for reaching those goals within a reasonable period of time (Edison Pet. 14–15; Local 17 Pet. 10–11). But these are essentially factual questions (see *Chance* v. *Board of Examiners*, 458 F. 2d 1167 (C.A. 2)) that do not, by themselves, warrant review by this Court.

factual determination is unwarranted. See *Comstock* v. *Group of Institutional Investors,* 335 U.S. 211, 214. In view of the discriminatory assignment of blacks to low opportunity jobs, a seniority system that requires an employee to forfeit his seniority and wage rate if he transfers to another job perpetuates that discrimination by discouraging blacks from transfering to departments with high opportunity jobs and by denying those who do transfer an equal opportunity to advance.

Petitioner unions argue that the seniority system is neutral, applying equally to whites and blacks, and is, therefore, a *bona fide* system which may not be disturbed by the courts (Local 223 Pet. 8; Local 17 Pet. 13). They apparently rely upon Section 703(h), which provides that

> it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority * * * system, * * * provided that such differences are not the result of an intention to discriminate because of race * * *.

It is well settled that a *bona fide* seniority system within the meaning of Section 703(h) must be more than facially neutral.[15] A seniority system which tends

[15] As the court of appeals recognized (Pet. App. 95a), an intentionally adopted employment practice which operates to discriminate is not saved from illegality by a mere neutral purpose which does not qualify as business necessity. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432. Significantly, petitioners do not contend that preservation of the seniority system is compelled by business necessity.

to deny black employees equal access to traditionally "white jobs" to which they were not assigned because of their race, and which makes seniority in such jobs the controlling requirement for promotion, is unlawful under Title VII. *Quarles* v. *Philip Morris, Inc.,* 279 F. Supp. 505 (E.D. Va.); *Local 189, United Papermakers and Paperworkers* v. *United States,* 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919; *United States* v. *Bethlehem Steel Corp.,* 446 F. 2d 652 (C.A. 2); *United States* v. *Chesapeake and Ohio Ry. Co.,* 471 F. 2d 582 (C.A. 4), certiorari denied, 411 U.S. 939; *Bowe* v. *Colgate, Palmolive Co.,* 489 F. 2d 896 (C.A. 7); see also *United States* v. *St. Louis-San Francisco Ry. Co.,* 464 F. 2d 301 (C.A. 8), certiorari denied, 409 U.S. 1116; *Jones* v. *Lee Way Motor Freight, Inc.,* 431 F. 2d 245 (C.A. 10), certiorari denied, 401 U.S. 954.[16]

Moreover, the differences in terms and conditions of employment applicable to workers in high and low opportunity jobs, as they operate to preclude blacks from advancement in high opportunity jobs, are differences which result from discrimination on the basis of race, within the meaning of the proviso to Section

[16] These cases involve discrimination prior to the effective date of Title VII, which discrimination was perpetuated after that date by a seniority system. The legislative history of Title VII reflects an intention to protect seniority lists existing on the effective date of the Act. See the Department of Justice and Clark-Case interpretive memoranda placed in the record by Senator Clark (110 Cong. Rec. 7206–7207, 7212–7215 (1964)). Where, as here, discriminatory assignment occurred after the Act's effective date, there is additional reason for taking steps to eliminate the effects of that discrimination.

703(h), and therefore are not protected by that section. *Local 189, United Papermakers and Paperworkers* v. *United States, supra,* 416 F. 2d at 995; *Quarles* v. *Philip Morris, Inc., supra,* 279 F. Supp. at 577. For this reason, even if operation of the company's seniority system were not itself an unlawful employment practice, the relief approved by the court of appeals would be appropriate as an exercise of the broad remedial powers authorized by Section 706(g) to afford effective relief from the concededly discriminatory assignment practices of Edison.

The relief approved by the court of appeals did not eliminate the existing seniority system. It simply made provision for qualified [17] class members to be given an opportunity to attain their rightful place within that system. The district court order, as modified by the court of appeals, permits all qualified blacks employed by Edison in low opportunity jobs to effectuate a "single transfer" [18] to another job, within five years from the effective date of the order. Upon transfer, class members retain their existing wage rate and are credited with company seniority, as if it were seniority in a department or smaller unit (Pet. App. 68a–69a, 101a–102a). Relief of this nature has generally

[17] The district court's order recognizes a qualification requirement, since it contemplates that a class member may be returned to the department from which he transferred because of disqualification (Pet. App. 68a–69a) and that he may be required to take a position which provides training necessary to advancement (*id.* at 68a).

[18] If that transfer does not work out, the employee has two additional opportunities to transfer (Pet. App. 68a–69a).

been granted in like situations. See cases cited *supra,* p. 17.

Contrary to petitioner's contentions (Local 223 Pet. 8, 9–10), the court's order does not give "super seniority" to members of the affected class, nor does it discriminate against whites. Under the order, no class member will be credited with seniority he has not earned.[19] Since class members will be permitted to transfer only to jobs for which they are qualified, they are not being preferred over whites who hold high opportunity jobs. To the extent that whites' seniority expectations are defeated, they are "unearned expectations" based, not upon greater seniority, but upon a discriminatory assignment system. *Waters* v. *Wisconsin Steel Works,* 502 F. 2d 1309 (C.A. 7).

The order respecting transfer from low opportunity jobs is properly limited to black employees. Whites hold low opportunity jobs either because they chose not to apply for high opportunity jobs or because they were not qualified for them. Race was not the determinative factor in their assignment, and relief designed to undo the effects of racial discrimination need not include them. See *Jones* v. *Lee Way Motor Freight, Inc., supra,* 431 F. 2d at 249.

Petitioners argue that the relief is improper because it extends to some who were not victims of dis-

[19] The issue of fictional or constructive seniority is not presented here. Thus, the cases cited by petitioner Local 17—*Franks* v. *Bowman Transportation Co.*, 495 F. 2d 398 (C.A. 5), certiorari granted, 420 U.S. 989, and *Meadows* v. *Ford Motor Co.*, 510 F. 2d 939 (C.A. 6)—are inapposite.

crimination (Local 223 Pet. 9; Local 17 Pet. 13). Some blacks presumably would have been assigned to low opportunity jobs even in the absence of discrimination. Since there is no way to single out those individuals, and since petitioners have suggested none, full relief can be afforded only by applying the remedy to all presently qualified black employees assigned to low opportunity jobs. *United States* v. *Bethlehem Steel Corp., supra,* 446 F. 2d at 660.[20]

4. Contrary to petitioner Edison's assertion that the government cannot sue for back pay in an action brought under Section 707 (Edison Pet. 19–21), it is settled that that Section authorizes such awards. *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 920 (C.A. 5); *United States* v. *Masonry Contractors Ass'n of Memphis, Inc.*, 497 F. 2d 871, 876 (C.A. 6); *United States* v. *Wood, Wire and Metal Lathers Local 46,* 328 F. Supp. 429, 441 (S.D. N.Y.), affirmed, 471 F. 2d 408 (C.A. 2), certiorari denied, 412 U.S. 939; see *United States* v. *N. L. Industries,* Inc., 479

[20] Petitioner Local 223 cites three cases in arguing that there is a conflict of authority: *Jersey Central Power & Light Co.* v. *IBEW Locals*, 508 F. 2d 687 (C.A. 3), petition for a writ of certiorari pending, No. 75–182; *Watkins* v. *United Steel Workers*, 516 F. 2d 41 (C.A. 5); *Waters* v. *Wisconsin Steel Works*, *supra* (Local 223 Pet. 8–9). These cases involve issues different from those in the instant case, as two of the courts recognized. *Waters* v. *Wisconsin Steel Works*, 502 F. 2d at 1320; *Watkins* v. *United Steel Workers*, 516 F. 2d at 46. In each, the court rejected the argument that newly hired employees, who had not themselves suffered discrimination, should be given fictional company (as distinguished from departmental) seniority because others in the same minority group had suffered discrimination in the past.

F. 2d 354 (C.A. 8). The legislative history of Section 707 supports that construction.[21]

Petitioner cites a single district court case—*United States* v. *United Ass'n of Journeymen,* 364 F. Supp. 808 (D. N.J.) in support of its position that back pay is unavailable (Edison Pet. 20). The court in that case ruled that the Attorney General could not sue for back pay under Title VII as originally enacted, but it suggested that such relief might be available in actions, like the present one, brought after the effective date of the 1972 Amendments to Title VII (*id.* at 832).

Specific provision for back pay relief under Section 706 does not preclude the award of such relief under the more general provisions of Section 707. In the absence of a clear legislative prohibition, a limitation on the authority of a court of equity to order full relief should not be implied. See *Porter* v. *Warner Holding Co.,* 328 U.S. 395; *Mitchell* v. *DeMario Jewelry, Inc.,* 361 U.S. 288.[22]

[21] See *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 920 (C.A. 5), citing 110 Con. Rec. 12595 (remarks of Senator Clark), 12722 (remarks of Senator Humphrey), 14220 (remarks of Senator Holland).

[22] The 1972 Amendments gave the Attorney General and the EEOC authority to bring suit under Section 706, which provides for back pay relief in individual instances of discrimination. Section 707 was amended to provide that actions brought under that Section are to be "conducted in accordance with the procedures set forth in section [706]." As the Fifth Circuit stated in *United States* v. *Georgia Power Co., supra*, 474 F. 2d at 920, it would be "incongruous" to assume "that Congress would have thought it appropriate to give the EEOC and the

5. The court of appeals ruled that all black employees were eligible to be considered for back pay but that each individual had to establish his entitlement before an award would be made (Pet. App. 97a).[23] By doing so, the court did not, as petitioner Detroit Edison contends (Pet. 16), permit awards of back pay to employees who have not suffered discrimination. The district court found pervasive discrimination against blacks and discriminatory transfer and promotion policies (Pet. App. 13a, 21a, 26a, 37a). There was some evidence of discrimination against blacks in high opportunity jobs (*id.* at 22a). At most, the court of appeals' judgment would permit those subject to that pervasive discrimination to demonstrate entitlement to back pay by showing that they did not get jobs for which they were qualified. It is clear from the court of appeals' opinion that it did not intend to compensate those who had not suffered discrimination, and there is no reason to believe that the district court will do so.

Petitioner's further contention, that the class eligible for back pay relief should have excluded former employees not employed within 210 days prior to the filing with the EEOC of the Stamps charge, is not

Attorney General authority to sue for back pay under Section 706 but not in cases involving the more serious Section 707 problems."

[23] The court of appeals limited the class by requiring proof of entitlement, since the district court order would have awarded back pay to all black employees in low opportunity jobs, according to a formula, and without a further showing of entitlement (Pet. App. 67a, 69a–70a).

properly presented for review since it was not raised in the court of appeals. Moreover, there is nothing in the court of appeals' opinion to indicate that such individuals are to be included in the class eligible for back pay.[24]

6. Both petitioner Edison and petitioner Stamps challenge the test adopted by the court of appeals for establishing entitlement to back pay (Edison Pet. 17–18; Stamps Pet. 12–16). Each attaches a different meaning to the requirement that an employee seeking back pay must show that "he indicated a desire to transfer to a vacant job" (Pet. App. 106a). Because the requirement is subject to various interpretations, we believe that review at this time would be premature. Since the court of appeals opinion does not specify how or to whom an employee must have indicated a desire to transfer, the district court will have to answer those questions in applying the test.[25] It is

[24] The court of appeals' statement that "there *may* be former employees who have left the service of Edison and who should participate in the back-pay provisions" (Pet. App. 97a; emphasis added) cannot fairly be read to require the granting of back pay to all former employees regardless of individual circumstances.

[25] We have some concern that the court of appeals' test may be read to preclude the award of back pay relief to a victim of discrimination who did not indicate his desire to someone in a position of authority in the company or one of the unions. Under the circumstances of this case, where an effort to transfer would have been futile and where black employees would not have thought it reasonable to make such an effort, they should not be required to have indicated a desire in that fashion. If the test were construed to impose that requirement, it would conflict with decisions holding that entitlement to back

entirely possible that the district court's implementation of the test will be acceptable to all parties. In any event, meaningful review can be obtained only on a fuller record.

Greater definition is also needed of the requirement that the employee show that "the position was filled by someone possessing the qualifications of the applicant or someone less qualified" (*ibid.*). Given the invalidation of the tests previously used by Detroit Edison (*id.* at 60a–62a), it is not clear what proof the district court will require to demonstrate comparative qualifications.

7. Local 223 argues that it complied with its obligation to represent its black members and therefore that it did not violate Title VII. The district court found that, in addition to acquiescing in the unlawful employment practices of Detroit Edison and negotiating a collective bargaining agreement that operated to continue the effects of that discrimination (Pet. App. 55a), Local 223 engaged in a number of discriminatory practices (*ibid.*). Those practices included (1) discouraging the filing of grievances by black employees and misinforming blacks regarding the unavailability of the grievance procedure to challenge unsuccessful interdepartment job bids (*id.* at 40a),

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pay cannot be conditioned on prior attempts to transfer to a "white" job when such attempts would have been futile. See, *e.g.*, *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251, 1256 (C.A. 5); *Hairston* v. *McLean Trucking Co.*, 520 F. 2d 226 (C.A. 4). Since we believe that the opinion is subject to less burdensome interpretations, however, we do not believe that review would be appropriate at this time.

(2) deliberately gerrymandering seniority districts to deny promotional opportunities to blacks (Pet. App. 41a), (3) requiring adherence to seniority rules for blacks given undesirable positions, when the same requirements had not been imposed on whites (*id.* at 40a–41a), and (4) denying blacks positions of authority in the union (*id.* at 41a). There was no error in concluding on the basis of these findings, which were upheld on appeal, that Local 223 had not adequately represented the interests of its black members.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-220
No. 75-221

LOCAL 223, UTILITY WORKERS UNION OF AMERICA, LOCAL 17, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioners,

—v.—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WILLIE STAMPS, *et al.*,
Respondents.

BRIEF OF RESPONDENTS STAMPS, ATKINSON AND STANFIELD IN RESPONSE TO PETITIONS OF LOCAL 223, UTILITY WORKERS UNION OF AMERICA AND LOCAL 17, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS FOR CERTIORARI

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Table of Contents

Page

Table of Authorities ii

Summary. 1

Argument 3

A. The findings of the District Court, affirmed by the Circuit Court of Appeals, clearly establish discriminatory conduct on the part of both unions as well as the Detroit Edison Company and thus attorneys' fees and other relief were properly awarded against all defendants 3

B. Both unions rely upon seniority precedent which has no applicability to the facts set forth above. 8

C. Temporary remedial quotas were appropriate under the circumstances of this case 11

Conclusion 12

Table of Authorities

Cases	Page
Alioto v. Western Addition Community Organization, No. 75-309, December 8, 1975. . .	12
Franks v. Bowman, 495 F. 2d 398 (5th Cir. 1974)	9
Griggs v. Duke Power Company, 401 U.S. 424 (1971)	11
Jersey Central and Light v. International Brotherhood of Electrical Workers, 508 F. 2d 687 (3rd Cir. 1975)	8
Jones v. Lee Way Motor Freight, Inc., 431 F. 2d 245 (10th Cir. 1970)	8, 9
Robinson v. P. Lorrilard, 444 F. 2d 791 (4th Cir. 1971).	9
Waters v. Wisconsin Steelworkers, 502 F. 2d 1309 (7th Cir. 1974). .	8, 9
Watkins v. United Steelworkers, 516 F. 2d 41 (5th Cir. 1975). . .	8
United Papermakers v. United States, 416 F. 2d 980 (5th Cir. 1969) .	6, 7, 9
United States v. Bethlem Steel, 446 F. 2d 652 (2nd Cir. 1971) . .	8, 9

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-220
No. 75-221

LOCAL 223, UTILITY WORKERS UNION OF AMERICA, LOCAL 17, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WILLIE STAMPS, et al.,

Respondents.

BRIEF OF PLAINTIFFS STAMPS, ATKINSON AND STANFIELD IN RESPONSE TO PETITIONS OF LOCAL 223, UTILITY WORKERS UNION OF AMERICA AND LOCAL 17, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS FOR CERTIORARI

SUMMARY

Petitioners, Local 223, Utility Workers Union of America and Local 17, International Brotherhood of Electrical Workers seek

review by Writ of Certiorari of seven determinations made by the Court of Appeals for the Sixth Circuit, below. 1/ The Plaintiffs oppose the grant of the Union Petitions as to all determinations by the Circuit Court of Appeals on the grounds that none is of sufficient importance, or a departure from settled principles such as to warrant issuance of the Writ.

1/ Local 223, only raises 4 issues in its petition. In fact, however, in Issues 2, 3 and 4, Local 17 has raised the same issue that Local 223 raises in Issue 1, i.e., a claim, contrary to the determination of both courts below, that the union-negotiated departmental and job seniority systems did not operate in a discriminatory fashion. Although Local 17 raises the issue of adequacy of class representation as it relates to the ability of plaintiffs to represent those who were discriminated against by Local 17, no argument or authority to support its view is set forth in the Local 17 petition. As we note below, all plaintiffs and members of the affected class were harmed by the racially discriminatory practices of Local 17. Similarly, no authority is cited by either union for the proposition that attorneys' fees should not be awarded, the position of both defendants-unions being that they should not be awarded because neither union is guilty of racial discrimination. As we note below, this position is completely untenable.

ARGUMENT

I.

THE DETERMINATIONS BELOW UPON WHICH PETITIONERS SEEK REVIEW DO NOT WARRANT REVIEW OR FAIL TO RISE TO THE IMPORTANCE REQUIRED FOR THE WRIT.

A. The findings of the District Court, affirmed by the Circuit Court of Appeals, clearly establish discriminatory conduct on the part of both unions as well as the Detroit Edison Company and thus attorneys' fees and other relief were properly awarded against all defendants.

The central theme of the petitions filed by Local 223 and Local 17 is that they were not involved in or party to the pattern of racial discrimination engaged in by the Detroit Edison Company. See, for instance, the Petition for Certiorari in Docket No. 75-220, p. 15 of Local 223 which states that an award of attorneys' fees against Local 223 is "unjustifiable" because it has "conducted itself in an exemplary manner as to the very serious obligation it has to all its members. . ." The findings of the District Court affirmed by the Circuit Court of Appeals, are that Local 223 retaliated against plaintiff by bringing this action and for his civil rights activities engaged in at the Detroit Edison Company, Joint Appendix, Appendix C,

1271-1272, and the following: "Defendant Utility Workers Union, Local 223, has misinformed black members by advising such members that unsuccessful bids involving jobs outside their departments cannot be put through the grievance procedure under the collective bargaining agreement. Black employees have been discouraged from filing grievances and have not sought to use the grievance procedure to obtain relief from discrimination because of their lack of confidence in defendants Local 223 and Detroit Edison Company. Local 223, has insisted upon strict adherence to seniority for black meter readers consigned by that system to undesirable routes when seniority had not been followed uniformally (sic) for white meter readers before blacks were hired. Defendant Local 223, Utility Workers Union of America, and Detroit Edison Company have deliberately gerrymandered seniority districts so as to deny black union members promotional opportunities in the better paying jobs. Defendant Local 223 has negotiated and acquiesced in discriminatory seniority, bidding and posting procedures which have the effect of locking blacks into low opportunity jobs. Defendant Local 223 apparently has never protested Detroit Edison Company's hiring or promotion policies with the Company itself, before any administrative agency -- federal or state; or before any court." Joint Appendix, Appendix C, pp. 1290, 1290-1291.

The Courts below found that blacks

were assigned disproportionately to low opportunity jobs and that high opportunity, better paying jobs - particularly in skilled trades and supervisory classifications - were virtually all white and that this result had been accomplished through a wide variety of discriminatory practices. Joint Appendix, Appendix C, pp. 1271-1278. As the findings relate to both Local 223 and Local 17, they show that both unions had negotiated collective bargaining agreements with the Detroit Edison Company which (1) made it impossible for employees to carry seniority from one bargaining unit or department to another; (2) did not protect the wage rate of an employee who transferred from one department or unit to another, and thus subjected such workers to a reduction of economic benefits; (3) discouraged blacks from applying for high opportunity jobs because of the above mentioned seniority and wage rate practices. Moreover, it was impossible for many blacks to apply for all-white, high opportunity jobs because (1) the jobs were only posted in departments composed exclusively of high opportunity job classifications where virtually no blacks were employed and, thus, blacks were not even aware of such vacancies; (2) in the case of Local 17 the collective bargaining agreement provided that priority for promotion into vacancies was to be given to employees within the unit or department - and, once again, the only employees within the department and unit were practically always

white, 2/ Joint Appendix, Appendix C, 1287-1290. As in all Title VII cases involving discriminatory departmental seniority procedures, 3/ the problem arises out of the

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2/ Contrary to the assertions contained in the Local 17 petition both courts below found that the above-noted procedures negotiated by Local 17 and the Detroit Edison Company discriminatorily excluded blacks who were outside the Local 17 bargaining unit and unlawfully retarded the promotional advance of those few blacks who had been fortunate enough to penetrate this wall of racial discrimination, Joint Appendix, Appendix C, pp. 1277-1278, 1287-1291.

3/ For the first time, in the petition filed with this Court, Local 223 claims that there is "economic justification" for the practices referred to above. This argument -- which has never been advanced to either the District Court or the Circuit Court of Appeals -- is completely unsupported by the record. No evidence of economic justification was ever introduced at the trial level. And even if it was introduced, it is irrelevant as a matter of law because the appropriate legal defense in such circumstances is business necessity and not justification. See e.g. United Papermakers v. United States, 416 F. 2d 980 (5th Cir. 1969).

Similarly Local 223 at pp. 14-15 main-

discriminatory exclusion of blacks from high opportunity jobs. See, e.g., United Papermakers v. United States, supra. In the instant case, those few blacks who were fortunate enough to be hired at any level by the Company were employed for the most part in low opportunity jobs. The procedures contained in the collective bargaining agreements referred to above locked blacks into such jobs -- and both courts below so found.

Of course, blacks were in a substantial minority in all departments because of the pattern of hiring discrimination which was found by the courts below. 4/ Thus, the fact that whites were also hired into low opportunity jobs is irrelevant. The focus of the judiciary in such circumstances is upon the exclusion of blacks from high opportunity jobs. See, e.g., Jones v. Lee

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3/ (cont.) tains for the first time that the company is hiring employees "outside the work force" in preference to "white seniority employees." There is no support in the record for this vague assertion. If Local 223 has a complaint in this regard it should be addressed to the District Court.

4/ Of course, there are areas in the Company where blacks constitute a majority of those assigned to low opportunity jobs. See e.g., Joint Appendix, Appendix C, pp. 1277, 1274-1275.

Way Motor Freight, Inc., 431 F. 2d 245 (10th Cir. 1970); United States v. Bethlehem Steel, 446 F. 2d 652 (2nd Cir. 1971). Whites were not similarly excluded from high opportunity jobs on racial grounds and thus no problem relating to racial discrimination arises from the fact that they, like blacks, have been assigned to low opportunity jobs. Although the courts below also found that Local 17 "aided and abetted" defendant Edison's discriminatory hiring practices, union involvement in the exclusion of blacks from high opportunity jobs is established primarily through the negotiation of the above-mentioned collective agreement procedures. Accordingly, attorney's fees were properly awarded against all defendants, including the Unions.

B. Both unions rely upon seniority precedent which has no applicability to the facts set forth above.

In their petitions to this Court both unions rely upon law which has nothing whatsoever to do with the facts of the instant case. For instance, in the Petition for Certiorari Local 223, pp. 8-10, Local 223 places great stress and emphasis upon the decisions of the Third, Fifth and Seventh Circuit Courts of Appeals in Jersey Central and Light v. International Brotherhood of Electrical Workers, 508 F. 2d 687 (3rd Cir. 1975); Watkins v. United Steelworkers, 516 F. 2d 41 (5th Cir. 1975); and Waters v.

Wisconsin Steelworkers, 502 F. 2d 1309 (7th Cir. 1974). However, in sharp contrast to the facts of the instant case, these cases involve the so-called "last hired - first fired" issue where minority employees seek protection against layoffs on the theory that layoffs trigger an alleged discriminatory impact where minorities have been hired recently. These cases have nothing whatsover to do with the instant case because they attack plantwide seniority and the issue here involves departmental seniority discrimination which fences blacks out of high opportunity jobs - practices which have been declared by all circuit courts of appeals to be unlawful, 5/ including the courts below.

Similarly, Local 17 relies upon the grant of certiorari by this Court in Franks v. Bowman, 495 F. 2d 398 (5th Cir. 1974), and while resolution of the issues presented in Franks arguably may have a bearing upon the grant of seniority credits to rejected applicants by the courts below, this issue is not raised in either Petition. Both Petitions make it clear that their attack

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5/ See e.g., United Papermakers v. United States, supra; United States v. Bethlehem Steel, supra; Jones v. Lee Way Motor Freight, Inc., supra; Robinson v. P. Lorrilard, 444 F. 2d 791 (4th Cir. 1971). See cases cited by District Court in conclusions 6-13, Joint Appendix, Appendix C, 1306-1309.

upon the rulings below is predicated upon the view that both courts erred when concluding that departmental seniority operated in a discriminatory fashion against incumbents in this case - a view contradicted by all applicable authority. Accordingly, the cases relied upon by the unions are inapplicable because (1) the facts of the instant case do not involve layoffs in any shape or form in contrast to the authority relied upon by the unions and (2) the Franks issue has not been placed before this Court in either Petition filed by the Unions in this case.

Finally, the Unions claim that they have not discriminated because they are not involved in the hiring decisions of the employer. However, nothing in the District Court's order or the Circuit Court's opinion requires either union to do anything about hiring whatsover. The District Court's order is completely silent about union obligations in the hiring area. Thus, nothing is presented to this Court relating to such subject matter.

It is true that Local 17 was found to have aided and abetted Edison's discriminatory hiring practices. It is also true that the opinions of both the courts below concluded that the failure of the Unions to press Edison to change discriminatory hiring policies and, in the case of Local 17, its involvement in the hiring discrimination itself, violated both Title VII and the

National Labor Relations Act duty of fair representation obligation. No cases are cited by either Union which are contrary to the view expressed in the District Court and Circuit Court of Appeals opinions. In any event, inasmuch as the District Court's order does not address the issue, the Unions are in the position of inviting this Court to resolve an issue which was not definitively resolved below.

C. Temporary remedial quotas were appropriate under the circumstances of this case.

Both Local 223 and Local 17, like Detroit Edison Company, challenge the imposition of temporary remedial quotas which were affirmed below. Like the Detroit Edison Petition, we note once again that defendants in the instant litigation inveigh "eloquently against the evils of race discrimination with a fervor characteristic of the recent convert." Plaintiff's Petition for Certiorari, p. 4. Here deliberate and malicious racial discrimination, in addition to the kind of discriminatory practices condemned by Griggs v. Duke Power Company, 401 U.S. 424 (1971), and the departmental seniority cases, coupled with an almost complete absence of blacks from skilled trades and supervisory positions, make it clear that the temporary remedial quotas imposed in this case were an appropriate form of relief for the courts below to

fashion. In this connection, we refer the Court to our Brief in response to the Petition of Detroit Edison Company, pp. 4-8, and the cases cited therein. The fact that the remedy complained of by Local 223 and Local 17 fits comfortably within the confines of well-settled precedent has been amply demonstrated not only by the authority which we cited in our previous Brief, but also by this Court's denial of certiorari in connection with a decision by the Ninth Circuit providing for temporary remedial quotas even where the racial discrimination was unintentional, and in no way comparable to the egregious behavior engaged in by all three defendants in this litigation. See Alioto v. Western Addition Community Organization, No. 75-309, December 8, 1975.

CONCLUSION

For the reasons stated above, as well as in our Brief in response to Petition of Detroit Edison Company for certiorari, the Writ of Certiorari should be denied as to all issues raised by Local 223 and Local 17.

Respectfully submitted,

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